

DOCKET



SUPREME COURT

OF THE UNITED STATES

No. 11-10362

Title: Kim Millbrook, Petitioner

v.

United States

Docketed: May 17, 2012

Lower Ct: United States Court of Appeals for the Third Circuit

Case Nos.: (12-1531)

Decision Date: April 23, 2012

Questions

Presented

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

May 10 2012 Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed.  
(Response due June 18, 2012)

Jun 18 2012 Order extending time to file response to petition to and including July 18, 2012.

Jul 11 2012 Order further extending time to file response to petition to and including August 17, 2012.

Aug 17 2012 Brief of respondent United States in opposition filed.

Aug 30 2012 DISTRIBUTED for Conference of September 24, 2012.

Sep 25 2012 Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following question: Whether 28 U.S.C. Sec. 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of Federal law.

Oct 4 2012 Motion to appoint counsel filed by petitioner Kim Millbrook. (Distributed)

Oct 9 2012 Motion to appoint counsel filed by petitioner GRANTED. , and it is ordered that Christopher J. Paoletta, Esquire, of New York, New York, is appointed to serve as counsel for the petitioner in this case.

Nov 6 2012 The time to file the joint appendix and and petitioner's brief on the merits is extended to and including November 30, 2012.

Nov 9 2012 Letter of respondent United States filed. (Distributed)

Nov 30 2012 Brief of respondent United States supporting reversal and remand filed.

Nov 30 2012 Joint appendix filed. (Statement of costs filed)

Nov 30 2012 Brief of petitioner Kim Millbrook filed.

Nov 30 2012 Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.

Dec 3 2012 Jeffrey S. Bucholtz, Esquire, of Washington, D. C., is invited to brief and argue this case, as amicus curiae, in support of the judgment below.



Dec 7 2012 The time to file the brief of Court-Appointed amicus curiae is extended to and including January 11, 2013.

Dec 7 2012 Brief amici curiae of Lambda Legal Defense and Education, Inc., et al. filed.

Dec 7 2012 Brief amicus curiae of Lewisburg Prison Project filed.

Dec 7 2012 Brief amicus curiae of Rutherford Institute filed.

Dec 18 2012 SET FOR ARGUMENT ON Tuesday, February 19, 2013.

Jan 4 2013 CIRCULATED.

Jan 11 2013 Record from U.S.C.A. for Third Circuit and U.S.D.C. for the Middle District of Pennsylvania is electronic.

Jan 11 2013 Brief amicus curiae of Court-Appointed amicus curiae in support of the judgment below filed. (Distributed)

Feb 11 2013 Motion of the Solicitor General for divided argument out-of-time filed.

Feb 11 2013 Reply of respondent United States filed. (Distributed)

Feb 11 2013 Reply of petitioner Kim Millbrook filed. (Distributed)

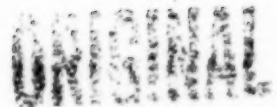
Feb 15 2013 Motion for divided argument filed by the Solicitor General out-of-time GRANTED.

Feb 19 2013 Argued. For petitioner: Christopher J. Paoella, New York, N. Y. (Appointed by this Court.) For respondent in support of reversal and remand: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For Court-appointed amicus curiae in support of judgment below: Jeffrey S. Bucholtz, Washington, D. C.

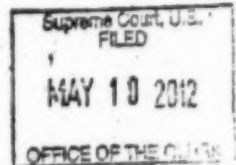
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**PETITION  
FOR  
WRIT OF  
CERTIORARI**

111.0362



No. \_\_\_\_\_



IN THE

SUPREME COURT OF THE UNITED STATES

Kim Millbrook — PETITIONER  
(Your Name)

VS.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The UNITED STATES Court of Appeal For The Third Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kim Millbrook #13700-026  
(Your Name)

PO Box 1000 USP Lewisburg  
(Address)

Lewisburg, Pa 17037  
(City, State, Zip Code)

012  
(Phone Number)

Best Copy Available

QUESTION(S) PRESENTED

- 1). Whether The U.S. Court OF Appeals Erred by affirming summary Judgment in Favor OF the defendants on the intentional tort claim only without addressing, hearing or ruling on the negligence claim and disregarded it?
- 2). Should have the U.S. Court OF Appeals affirmed in Part in Favor OF the Defendants as to the intentional claim, and reversed in Part in Favor OF the Plaintiff as to the negligence claim, and thereby ordering the lower district court to Proceed on the negligence claim?
- 3). Whether based on questions one and two (1) and (2), the Plaintiff was Prejudiced thereby?

## LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

✕ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

### UNITED STATES COURT OF APPEALS:

- 1) SLOVITER - CIRCUIT JUDGE
- 2) FISHER - CIRCUIT JUDGE
- 3) WEIS - CIRCUIT JUDGE

### UNITED STATES DISTRICT COURT:

- 1) WILLIAM J. REARLON (Residing)

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## OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix <sup>"A"</sup>  A   to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix <sup>"B"</sup>  B   to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.



## JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 4-23-12

☒ No petition for rehearing was timely filed in my case. R/R

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: R/R, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including R/R (date) on R/R (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 4042 Bureau of Prisons Duties:

The United States Bureau of Prisons has a duty to provide those in its custody with suitable quarters; provide for their safekeeping, care, and subsistence; and provide for their protection, instruction and discipline. 18 U.S.C. § 4042

28 U.S.C. § 1346(b). Federal Tort Claim (FTCA):

Generally, the United States is immune from suit, but the Federal Tort Claim Act (FTCA) carries out particular circumstances in which the United States waives its immunity. One instance in which the United States waives immunity is when a person brings a negligence action against the government based on acts or omissions of its employees while the employees are acting within the scope of their offices or employment. 28 U.S.C. § 1346(b).

28 U.S.C. § 2680(c) Federal Tort Claim (FTCA):

"The United States is not liable for any claims arising out of assault or battery committed by Federal employees within the scope of their employment unless the employee was a law enforcement officer. There is no dispute that a correctional officer is a law enforcement officer; however in addressing the 2680(c) intentional tort exception in the FTCA, the Court noted that a investigative or

Law enforcement officer is defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

### 1st Amendment Provides In Pertinent Part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### 5th Amendment Provides In Pertinent Part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, where in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Constitutional and Statutory Provisions involved Const...

6<sup>th</sup> Amendment Provides In Pertinent Part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.



# STATEMENT OF THE CASE

On or About March 5<sup>th</sup> 2010 I, Kim Millbrook, was taken from G-Block shower and forced into the G-Block Basement by an Officer Pealer of Lewisburg (Brew) Program in the morning hours between 6 to 9 AM, and out into a cell by Pealer whom left but returned with (2) two other staff officers by the name of Edinger and Gimberling, staff officers Edinger came to the cell I millbrook was locked inside and told me to turn around and back out of the cell which I millbrook did. Once out side of the cell Edinger grabbed me around my neck and began choking me and forced me to my knees that's when C/O Pealer stood in front of me and began to unzip his pants and told me to suck his dick, out of fear for my safety I complied C/O Gimberling at all times stood within by the basement door and did nothing to prevent or protect me from being sexually assaulted by Pealer or physically assaulted by Edinger, once the incident was over I was put back inside the cell I was taken out of and told by Edinger Pealer and Gimberling that if I told anybody about the incident they would kill me, they

then said that they knew who I was and where I was from and why I was sent to Lewisburg (smu) Program. Edinger called me a snitch and a dumb out little bitch and then they left. A short time later the P.R. Alama came down into the Basement to bring me my daily medication. I then reported to him that the guards Peeler, Gimberling, and Edinger had sexually assaulted me and were trying to kill me. He left and never came back. A short time later Peeler, Edinger, and Gimberling brought another inmate down into the Basement named Weber and began assaulting him by hitting and kicking him. I then asked Peeler, Edinger, and Gimberling why they were treating us like this. And Peeler replied "Shut your mouth millbrook before I make you suck my dick again." Later on that day I was taken out of the Basement and put into a cell back on G-Block. The next day I reported the incident to the medical staff that I was sexually assaulted. I was then interviewed by Captain Tate, (Sis) Pentin, Sis Foster and other staff officials and gave them a verbal statement about the incident that happened on 3-5-10 in the Basement on G-Block between me and the guards Edinger, and Gimberling. I was never medically assessed after the reported incident.

"End of Report"

### REASONS FOR GRANTING THE PETITION

The actions and the Decisions of the lower United States District Court and the United States Court of Appeals for the Third Circuit was erroneous and Prejudicial to this case and thereby violating Constitutional errors against their sworn oath of office to uphold the Constitution, in contravention of the United States Constitution, Federal Laws Rules and statutes, contrary to precedents and Decisions from other Circuit Courts and the Supreme Court of the United States, the Appeal Courts Decision was outside of their normal way of their decision making which deprived and denied Petitioner of his 1st amendment Right to Redress, 5th amendment Right of Due Process, and 6th amendment Right to self representation by them not fully not hearing, addressing, and making any Decision on Filing or the "FTCR" - Negligence claim Filed in the lower District Court.

- 1) The Petitioner Filed a "FTCR" Negligence and intentional Tort claim in the lower District Court against the United States for sexual assault and Battery or against (3) three government Correctional officers at Lewisburg (smu) program.
- 2) The Government Filed an Alternative motion to Dismiss or summary Judgement motion and argued that one of their claims was did the Plaintiff Negligence claim Fail.



actions. But when one government's employees  
"negligence" allows another government's employees  
to commit an intentional tort, the courts have  
found liability not for the intentional tort, but  
for the negligence that prepared the inter-  
national tort. The Petitioner stated clearly that  
while staff official Pealer and Edinger physically  
and sexually assaulted him in the presence of  
staff official Gimpel, whom stood watch on the  
Robert D. Wood and did nothing to prevent or  
protect Petitioner from the violent attack by the  
other (2) two staff officials this was a clear case  
of negligence against the Government, and also  
the two (2) staff officials Edinger and Pealer not  
a concerted duty to prevent or protect Petitioner  
from harm.

4) The Government also contends on the motion to  
Dismiss, on the alternative motion for sum-  
mary Judgment that the Petitioner inter-  
national tort claim under 28 U.S.C. 3260(c) that  
the United States is not liable of its employees  
except for certain intentional torts committed  
by investigative or law enforcement officers  
while executing a search, seizing evidence, or  
making arrests for violations of Federal law  
Pooler, 787 F.2d 9-272. The defendant argued  
that because the alleged assault did not arise



out of conduct during an arrest, search or seizure Petitioner's claim is not cognizable.

33 The Petitioner opposed the Government's argument that Petitioner did not have a constitutional claim because prison officials were executing a search, seizure, and arrest by forcing the Petitioner down into the basement and forced to perform oral sex on Correctional Officer Peeler. *Id.* Correctional Officer Edinger held Petitioner neck and Correctional Officer Dimasemling stood watch, see *Pooler v. United States*, 187 F.3d 868, 872 (3d Cir. 1999); The Petitioner argued that based upon the principles announced in *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that an investigative stop that momentarily detains a person is a seizure), Petitioner's sexual assault occurred during a seizure because Petitioner was placed in restraints and taken to the basement of the prison, see *Gallo v. City of Philadelphia*, 161 F.3d 217, 223 (3d Cir. 1998); the Third Circuit Court of Appeals recognized that "supreme court decisions provide that a seizure is a show of authority that restrains the liberty of a citizen". It added that an intentional limitation of liberty constitutes a seizure, see *id.*, at 225. This clearly was an exception to the 28 U.S.C. § 2680(c) clause.

6) Based on the above the District Court should not have granted summary judgment on Petitioner's negligence claim in the Defendant favor, but should have proceeded on the Petitioner negligent claim.

4) Petitioner filed a timely notice of appeal and the Court for the Third Circuit submitted the appeal for a possible dismissal pursuant to 28 U.S.C. § 1915A(2)(C) on summary basis pursuant to Third Circuit LAR 274 and I.O.P. 10.6, without hearing or addressing or making any ruling or decisions on the Petitioner's negligence claim, yet, overlooking and disregarding the negligence claim, the Third Circuit did affirm summary judgment by hearing addressing and ruling on the intentional tort claim erroneously.

Wherefore, the Petitioner sought  
reformation in this Court.

**CONCLUSION**

Wherefore, Petitioner respectfully requests that the Honorable Court reverse and remand the Arizona Court's decision with orders to proceed on the negligence claim.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kim Mullins

Date: 5-4-12

# APPENDIX "A"

U.S. Appeals Court # 3  
Repeal Case No. 12-1501  
Dated: April 23, 2012

**ALD-155**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 12-1531

---

KIM MILLBROOK,  
Appellant

v.

UNITED STATES OF AMERICA

---

On Appeal from the United States District Court  
for the Middle District of Pennsylvania  
(D.C. Civil No. 11-cv-00131)  
District Judge: Honorable William J. Nealon

---

Before: SLOVITER, FISHER and WEIS, Circuit Judges

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**JUDGMENT**

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) or summary action pursuant to Third Circuit LAR 27.4 and L.O.P. 10.6 on April 12, 2012. On consideration whereof, it is now hereby



ORDERED and ADJUDGED by this Court that the judgment of the District Court entered February 16, 2012 be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/Marcia M. Waldron,  
Clerk

DATED: April 23, 2012

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

No. 12-1531

---

KIM MILLBROOK,  
Appellant

v.

UNITED STATES OF AMERICA

---

On Appeal from the United States District Court  
for the Middle District of Pennsylvania  
(D.C. Civil No. 11-cv-00131)  
District Judge: Honorable William J. Nealon

---

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B)  
or Summary Action Pursuant to Third Circuit LAR 27.4 and L.O.P. 10.6

April 12, 2012

Before: SLOVITER, FISHER and WEIS, Circuit Judges  
(Opinion filed April 23, 2012)

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OPINION

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PER CURIAM.

Kim Millbrook, an inmate housed at the United States Penitentiary,  
Lewisburg Pennsylvania (USP-Lewisburg), appeals from an order of the District

Court granting defendant's motion for summary judgment. For substantially the same reasons provided by the District Court, we will affirm.

I.

Millbrook filed a complaint pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§2671-2680, naming as defendant the United States of America. According to the complaint, Millbrook was subjected to sexual assault while housed in the Special Management Unit (SMU) at USP-Lewisburg on or about March 5, 2010. On that date, Millbrook alleged that he was taken to the basement of the SMU and forced to perform oral sex on Correctional Officer Pealer while Correctional Officer Edinger held his neck and Correctional Officer Gimberling stood watch by the door. He also claimed that he was verbally assaulted during the incident.

Defendant filed a motion to dismiss or in the alternative for summary judgment, which the District Court granted. According to the defendant, Millbrook was involved in an altercation with his cell mate on the morning of March 4, 2010. As a result, both prisoners were placed in restraints and removed from their cell. They were then transferred to separate holding cells pending injury assessment and photographs. Millbrook claims that he was assaulted the next day



by correctional staff. Following an internal investigation, which included a medical assessment, Millbrook's claim was found to be unsubstantiated.

After reviewing Millbrook's response to defendant's motion, the District Court concluded that the defendant was entitled to summary judgment because Millbrook's FTCA claim is precluded by Pooler v. United States, 787 F.2d 868, 872 (3d Cir. 1986). This appeal followed.

## II.

We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over a district court's grant of summary judgment.<sup>4</sup> See Kaucher v. County of Bucks, 455 F.3d 418, 422 (3d Cir. 2006). The District Court's grant of summary judgment will be affirmed if the record demonstrates that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). An issue is material if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

We may summarily affirm if Millbrook's appeal presents no substantial question. See 3d Cir. L.A.R. 27.4 and 3d Cir. I.O.P. 10.6.

### III.

Millbrook contends that the defendant is liable under the FTCA for the alleged assault on March 5, 2010. Under 28 U.S.C. § 2680(h), the United States is generally not liable for intentional torts of its employees except for certain intentional torts committed by investigative or law enforcement officers. See 28 U.S.C. § 2680. We have limited claims that arise under § 2680(h) to cases in which an intentional tort is committed by a law enforcement or investigative officer while executing a search, seizing evidence, or making arrests for violations of federal law. Pooler, 787 F.2d at 872. Defendant argued that because the alleged assault did not arise out of conduct during an arrest, search, or seizure, Millbrook's tort claim is not cognizable.

Defendant did not dispute that correctional officers may be deemed law enforcement officers for purposes of the FTCA. Assuming *arguendo* that they are, to the extent that Millbrook alleges that handcuffing and taking him to the basement of the SMU amounts to an unconstitutional seizure, we agree with the District Court that Pooler limits the term "seizure" to the seizure of evidence. Id. Further, Millbrook did not allege that the alleged conduct occurred in the course of an arrest for a violation of federal law, or during the course of a search. See 28 U.S.C. § 2680(h). Thus, we agree with the District Court that while the alleged

conduct is troubling, Millbrook has not shown that he is entitled to relief under the FTCA.<sup>1</sup>

As Millbrook's appeal presents no substantial question, we will summarily affirm the District Court judgment. See 3d Cir. L.A.R. 27.4 and 3d Cir. I.O.P.

10.6. Millbrook's motions for appointment of counsel are denied.

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<sup>1</sup> We also agree with the District Court that although Millbrook raises assertions of negligent behavior on the part of the correctional officers, it is clear that the alleged actions were intentional. Indeed, Millbrook stated in his complaint that he was "sexually assaulted and battered maliciously with evil intent by officers Pealer, Edinger and Gimberling." See Complaint at 5. Therefore, we agree that he did not state a negligence claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6).

UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

KIM MILLBROOK,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. 3:11-cv-131

(Judge Nealon)

FILED  
SCRANTON

FEB 16 2012

Per

DEPUTY CLERK

**MEMORANDUM**

**Background**

This action pursuant to the Federal Tort Claims Act (FTCA) was initiated by Kim Millbrook, an inmate presently confined at the United States Penitentiary, Lewisburg, Pennsylvania (USP-Lewisburg). Named as sole Defendant is the United States of America. Service of the Complaint was previously ordered.

According to the Complaint, Plaintiff was housed in the USP-Lewisburg Special Management Unit (SMU) on or about March 5, 2010. On said date, Plaintiff alleges that he was taken to the basement of the SMU housing unit and "forced to perform oral sex on a Correctional Officer Pealer while Correctional Officer Edinger held me around my neck in a choke hold., another Correctional Officer Gimberling stood watch by the door." (Doc. 1, ¶ IV). Plaintiff adds that those officers also verbally threatened him with further injury in an effort to dissuade him from reporting the incident. Millbrook seeks relief under the FTCA on the basis that Officers Pealer, Edinger and Gimberling, while acting within the scope of their employment, subjected him to sexual assault and battery.<sup>1</sup>

---

<sup>1</sup> A declaration by Plaintiff which accompanies his Complaint indicates that following the  
(continued...)

Defendant has responded to the Complaint by filing a motion to dismiss or, in the alternative, for summary judgment. See (Doc. 9). According to the Defendant, Inmate Millbrook was involved in an altercation with his cell mate on the morning of March 4, 2010. As a result, both prisoners were placed in restraints and removed from their cell. The combatants were transferred to separate holding pending injury assessment and photographs. The next day Millbrook asserted that he had been sexually assaulted by correctional staff. Following an internal investigation, which included a medical assessment, Plaintiff's claim was found to be unsubstantiated. See (Doc. 18, p. 4).

In addition to submitting a brief in opposition to said motion, Plaintiff has also filed a cross motion for summary judgment. See (Doc. 24). The cross motions for summary judgment are ripe for disposition.

### Discussion

#### Motion to Dismiss

Defendant's pending dispositive motion is supported by evidentiary materials outside the pleadings. Federal Rule of Civil Procedure 12(d) provides in part as follows:

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given reasonable opportunity to present all the material that is pertinent to the motion.

---

<sup>1</sup>(...continued)

alleged incident of March 5, 2010, he was subjected to additional sexual assaults by both correctional staff and another prisoner.

Millbrook also states that he was sexually assaulted by prison staff while previously confined at USP-Terre Haute. Since the only tortious conduct asserted in the Complaint relates to the March 5, 2010 USP-Lewisburg incident those additional allegations will not be considered.

FED. R. CIV. P. 12(b)(d). The Court will not exclude the evidentiary materials accompanying the Defendant's motion. Thus, the motion will be treated as solely seeking summary judgment.

### Standard of Review

Summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); See also Saldana v. Kmart Corp., 260 F.3d 228, 231-32 (3d Cir. 2001). A factual dispute is "material" if it might affect the outcome of the suit under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis that would allow a reasonable fact-finder to return a verdict for the non-moving party. Id. The court must resolve all doubts as to the existence of a genuine issue of material fact in favor of the non-moving party. Saldana, 260 F.3d at 232; see also Reeder v. Sybron Transition Corp., 142 F.R.D. 607, 609 (M.D. Pa. 1992). Unsubstantiated arguments made in briefs are not considered evidence of asserted facts. Versarge v. Township of Clinton, 984 F.2d 1359, 1370 (3d Cir. 1993).

Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in its complaint. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Instead, it must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Id. (internal quotations omitted); see also Saldana, 260 F.3d at 232 (citations omitted). Summary judgment should be granted where a party "fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." Celotex, 477 U.S. at 322-23. "'Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance.'" Saldana, 260 F.3d at 232 (quoting Williams v. Borough of West Chester, 891 F.2d 458, 460-61 (3d Cir. 1989)).

#### **Plaintiff's Summary Judgment Motion**

Middle District of Pennsylvania Local Rule 7.5 requires that a party who files a pretrial motion must submit a brief in support of said motion within fourteen (14) days of its being filed with the court. If a supporting brief is not timely filed, "such motion shall be deemed to be withdrawn."

A review of the docket establishes that Plaintiff has not filed a brief in support of his motion. Moreover, Millbrook's pending motion does not set forth any argument as to why summary judgment should be entered in his favor. An attached certificate of service indicates only that his motion being submitted in opposition to the Defendant's dispositive motion. Since Plaintiff has failed to submit a supporting brief as required by Local Rule 7.5, and his motion offers no basis whatsoever as to why entry of summary judgment in his favor is appropriate, his motion seeking entry of summary judgment (Doc. 24) will be deemed withdrawn.

#### **Defendant's Summary Judgment Motion**

Defendant's initial argument is that it is entitled to sovereign immunity to the extent that the Complaint is asserting an intentional tort claim because "the incident Millbrook alleges did not occur during the course of an arrest, search, or seizure." (Doc. 18, p. 6).

The FTCA provides a remedy in damages for tortious conduct by employees of the



United States. United States v. Muniz, 374 U.S. 150, 150 (1963). Under the FTCA, sovereign immunity is waived against persons suing the federal government for the commission of various torts. Simon v. United States, 341 F.3d 193, 200 (3d Cir. 2003). Liability under the FTCA only exists for conduct by government employees while acting within their scope of employment. Matsko v. United States, 372 F.3d 556, 559 (3d Cir. 2004). When determining if a defendant was acting within the scope of his employment at the time of the underlying incident, courts must look to the law of the state where the incident occurred. Doughty v. United States Postal Service, 359 F. Supp. 2d 361, 365 (D.N.J. 2005).

X However, the United States is immune from certain intentional torts committed by its agents. For instance, the United States is not liable for claims arising out of assault and/or battery committed by federal employees within the scope of their employment unless the employee was an investigative or law enforcement officer. See 28 U.S.C. § 2680(h), p. 8; McKinney v. United States, 2005 WL 2335318, \* 3 (M.D. Pa. 2005) (McClure, J.) (concluding that "the United States is not liable for claims arising out of assault and/or battery committed by federal employees within the scope of their employment unless the employee was an investigative law enforcement officer"). In the present matter, Defendant does not dispute that correctional officers may be deemed law enforcement officers for purposes of the FTCA.<sup>2</sup>

Rather, Defendant contends that Millbrook's FTCA claim is precluded by the Third Circuit Court of Appeals' interpretation of § 2680(h) in Pooler v. United States, 787 F.2d. 868,

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<sup>2</sup> Moreover, it has been recognized within this district that BOP staff members may be considered law enforcement officers. See King v. United States, Civil No. 93-258, slip op. at 2 (M.D. Pa. July 27, 1993) (Kosik, J.); Zakaria v. Bureau of Prisons, Civil No. 95-1787, slip op. at pp. 7-9 (M.D. Pa. April 29, 1998) (McClure, J.).



872 (3d Cir. 1986). In Pooler, the Court of Appeals held that § 2680(h) waives the government's sovereign immunity only in those cases in which a law enforcement or investigative officer commits one of the enumerated intentional torts "while executing a search, seizing evidence, or making an arrest." Id. The Court explained that based on the underlying legislative history that the investigative officer exception should only apply to conduct taken by investigative or law enforcement officers during the course of a search, seizure, or an arrest.<sup>3</sup> Id. at 872.

In Matsko, the Third Circuit Court of Appeals recognized that Pooler set forth a narrow reading of § 2680(h), but declined to undertake a determination as to whether Pooler should be broadened to encompass all activities undertaken by investigative officers. Matsko, 372 F.3d at 560. Pooler remains binding precedent on this Court.

Under Pooler, in order to be actionable under the FTCA, the alleged misconduct had to occur during an arrest, search, or seizure. In the present case, the alleged unconstitutional conduct of March 5, 2010 did not occur during the course of an arrest. Second, the challenged actions were not undertaken during the course of a search. The third enumerated activity set forth in Pooler was seizure.

The most common type of seizure is an arrest which results in detention. Plaintiff contends that based upon the principles announced in Terry v. Ohio, 392 U.S. 1 (1968) (holding that an investigative stop that momentarily detains a person is a seizure), and similar cases, the purported sexual assault occurred during a seizure because he was placed in restraints and taken

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<sup>3</sup> This Court recognizes that other courts not bound by the Pooler holding have adopted a broader view. See Ortiz v. Pearson, 88 F. Supp. 2d 151, 164-65 (S.D. N.Y. 2000).

to the basement of the SMU.<sup>4</sup> In Gallo v. City of Philadelphia, 161 F.3d 217, 223 (3d Cir. 1998), the Third Circuit Court of Appeals recognized that "Supreme Court decisions provide that a seizure is a show of authority that restrains the liberty of a citizen." It added that an intentional limitation of liberty constitutes a seizure. See id. at 225.

Based on Millbrook's allegations it would appear that there is a genuine issue as to whether the placement of Plaintiff in handcuffs and his being escorted to the basement of the SMU constituted a seizure. However, in Pooler, the Third Circuit Court of Appeals clearly indicated that seizure for purposes of § 2680(h) refers only to the seizure of evidence. Pooler, 787 F.3d at 872. In the present case, there are no facts alleged which could support a determination that the alleged conduct of March 5, 2010, occurred during a seizure of evidence as contemplated by Pooler.

Thus, although the purported conduct in the present case is troubling, it did not take place during an arrest, search, or seizure of evidence. Therefore, Plaintiff cannot obtain relief under the FTCA. See McKinney, 2005 WL 2335318 at \* 4. Since the alleged assault did not transpire during one of the enumerated acts recognized under Pooler, entry of summary judgment in favor of the Defendant with respect to Millbrook's FTCA allegations of assault and battery is warranted.

Finally, although Plaintiff also raises assertions of negligence in his Complaint, it is clear that the alleged assault and battery was intentional. Therefore, Millbrook has not stated a

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<sup>4</sup> A declaration (Doc. 21) submitted by Plaintiff in opposition to the request for summary judgment raises various new claims against USP-Lewisburg officials including assertions that he was improperly denied single cell status and was not protected from being assaulted from other prisoners; however, because these claims are not asserted in the Complaint they are not properly before this Court.

negligence claim upon which relief can be granted. See Hali v. United States, 2008 WL 919605\* 5 (M.D. Pa. April 2, 2008) (Rambo, J.).

An appropriate Order will enter.

A handwritten signature in black ink, appearing to read "William J. Rambo", written in a cursive style.

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United States District Judge

**DATED: FEBRUARY 16, 2012**

UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

KIN MILLBROOK,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

: CIVIL ACTION NO. 3:11-cv-131

: (Judge Nealon)

**FILED  
SCRANTON**

FEB 16 2012

Per \_\_\_\_\_

DEPUTY CLERK

**ORDER**

NOW, THIS 16<sup>th</sup> DAY OF FEBRUARY, 2012, in accordance with the Memorandum issued this date, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff's motion (Doc. 24) for summary judgment is **DEEMED WITHDRAWN**.
2. Defendant's dispositive motion is construed as solely seeking entry of summary judgment.
3. The Defendant's motion for summary judgment (Doc. 9) is **GRANTED**.
4. The Clerk of Court is directed to **CLOSE** the case.



United States District Judge

# **OPPOSITION BRIEF**

IN THE SUPREME COURT OF THE UNITED STATES

KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR. ✓  
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## QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner's allegation of his sexual assault by prison officials did not state a claim premised on negligence by those officials.

IN THE SUPREME COURT OF THE UNITED STATES

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No. 11-10362

KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not reported. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2012. The petition for a writ of certiorari was filed on May 10, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



## STATEMENT

1. Petitioner is a federal inmate who alleges that he was sexually assaulted by a federal correctional officer at the United States Penitentiary in Lewisburg, Pennsylvania. Petitioner alleges that three correctional officers participated in the assault: one allegedly directed petitioner to perform a sexual act on the officer; another allegedly restrained petitioner; and a third allegedly stood watch by the door. After petitioner reported to prison authorities that he had been assaulted, officials conducted an internal investigation which included a medical assessment. The investigation found petitioner's claims to be unsubstantiated. Pet. App. A2, B1-B2.

2. Petitioner filed this suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq., asserting both negligence and the intentional torts of assault and battery. The FTCA generally "waive[s] the sovereign immunity of the United States for certain torts committed by federal employees" within the scope of their employment. FDIC v. Meyer, 510 U.S. 471, 475 (1994). As a general matter, that waiver of immunity does not extend to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). That intentional-tort exception, however, is itself subject to an exception for certain

"acts or omissions of [federal] investigative or law enforcement officers," i.e., federal officers "who [are] empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." Ibid. The acts or omissions of such officers are cognizable under the FTCA if they give rise to a claim of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." Ibid.

3. The district court granted summary judgment to the government. Pet. App. B. First, the court concluded that petitioner did not "state[] a negligence claim upon which relief can be granted," because "it is clear that the alleged assault and battery was intentional." Id. at B7-B8. Second, the district court held that petitioner's intentional-tort claim was not actionable, because it fell within the FTCA's intentional-tort exception. Id. at B5-B7. The court explained that Pooler v. United States, 787 F.2d 868 (3d Cir.), cert. denied, 479 U.S. 849 (1986), had construed the FTCA to permit suits based on intentional torts by federal law-enforcement officers only when such officers "execut[e] a search, seiz[e] evidence, or mak[e] an arrest." Pet. App. B6 (quoting Pooler, 787 F.2d at 872). And because a "seizure" is actionable under 28 U.S.C. 2680(h) only when it involves "the seizure of evidence," the court rejected petitioner's contention that his claim was actionable because he purportedly was "seized"

when he was "placed in restraints and taken to the basement" of the facility before the alleged assault. Pet. App. B6-B7.

4. The court of appeals summarily affirmed in a non-precedential decision. Pet. App. A. The court of appeals agreed with the district court that petitioner had failed "to state a negligence claim on which relief could be granted," because "it is clear that the alleged actions were intentional," not negligent. Id. at A5 n.1. The court emphasized that petitioner himself had asserted that he "was 'sexually assaulted and battered maliciously with evil intent by [three specific correctional] officers.'" Ibid. (quoting complaint). The court of appeals also agreed with the district court that petitioner had failed to show that his intentional-tort claim was actionable under Pooler. Id. at A4-A5.

#### ARGUMENT

Petitioner contends (Pet. i, 9-10, 12) that the court of appeals erred in dismissing his "negligence claim." The decision of the court of appeals is correct, and its fact-bound rejection of petitioner's negligence claim does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. The questions that petitioner presents (Pet. i) turn exclusively on petitioner's contention that the court of appeals erred in dismissing his "negligence claim." Petitioner argues (Pet. 9-10) that federal correctional officers have a duty to

protect prisoners from assaults, and that FTCA liability can be premised on negligent failures to protect prisoners from intentional torts. Petitioner thus contends (Pet. 12) that the court of appeals mistakenly focused only on his "intentional tort" claim and "overlook[ed] and disregard[ed] the negligence claim." See also Pet. i (suggesting that the court of appeals should have "affirmed in part in favor of the [government] as to the intentional [tort] claim" but "reversed in part \* \* \* as to the negligence claim"). Petitioner is incorrect.

The court of appeals correctly concluded that petitioner did not state a negligence claim on which relief could be granted, because petitioner specifically alleged that officers sexually assaulted and battered him "maliciously with evil intent." Pet. App. A5 n.1 (quoting complaint). Petitioner's allegations are thus entirely inconsistent with negligence. The court of appeals' fact-bound ruling warrants no further review.

2. Although petitioner does not present a question challenging the disposition of his intentional tort claim (Pet. i), petitioner appears to contend (Pet. 10-11) that he sufficiently alleged that his purported assault was a "seizure" actionable under the FTCA as construed by the court of appeals in Pooler v. United States, 787 F.2d 868 (3d Cir.), cert. denied, 479 U.S. 849 (1986). Pooler, however, interpreted the FTCA's focus on law-enforcement officers authorized to "execute searches, to seize evidence, or to

make arrests," 28 U.S.C. 2680(h), to define the extent of the statute's application to intentionally tortious conduct. 787 F.2d at 872. Petitioner did not allege a "seiz[ure of] evidence" that would be actionable under Section 2680(h) as interpreted by Pooler. Pet. App. A4.

Although petitioner has not challenged Pooler's interpretation of the law-enforcement exception to the intentional-tort exception in Section 2680(h), a division of authority has arisen regarding the proper scope of that exception. Compare Pooler, 787 F.2d at 871-872, and Orsay v. United States Dep't of Justice, 289 F.3d 1125, 1134-1136 (9th Cir. 2002) (construing law-enforcement exception to apply to "only those claims asserting that the tort occurred in the course of investigative or law enforcement activities"), with Ignacio v. United States, 674 F.3d 252, 255-256 (4th Cir. 2012) (holding that exception applies if an "investigative or law enforcement officer commits one of the specified intentional torts, regardless of whether the officer is engaged in investigative or law enforcement activity"). That division of authority may eventually warrant this Court's review in a future case. The petition in this case, however, does not implicate the division of authority. Petitioner's contention that the alleged assault occurred during a seizure, Pet. 11 (citing Terry v. Ohio, 392 U.S. 1 (1968)), is premised upon the view that petitioner's claim must qualify as a "seizure" to fall within Section 2680(h)'s

law-enforcement exception. For that reason, this case is not an appropriate vehicle to resolve the division of authority about the scope of that exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

STUART F. DELERY  
Acting Assistant Attorney General

THOMAS M. BONDY  
STEVE FRANK  
Attorneys

AUGUST 2012



# **JOINT APPENDIX**

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**In the Supreme Court of the United States**

---

KIM MILLBROOK, PETITIONER

v.

UNITED STATES, RESPONDENT

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

**JOINT APPENDIX**

---

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---

PETITION FOR WRIT OF CERTIORARI FILED: MAY 10, 2012  
CERTIORARI GRANTED: SEPTEMBER 25, 2012

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

---

Docket No. 12-1531

**KIM MILLBROOK, PLAINTIFF-APPELLANT**

*v.*

**UNITED STATES OF AMERICA, DEFENDANT-APPELLEE**

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**DOCKET ENTRIES**

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| <b>DATE</b> | <b>PROCEEDINGS</b>                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|-------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 02/29/2012  | CIVIL CASE DOCKETED. Notice filed by Appellant Kim Millbrook in District Court No. 3-11-cv-00131. (MB)                                                                                                                                                                                                                                                                                                                                                        |
|             | * * * * *                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 03/08/2012  | CLERK ORDER granting Motion to proceed in forma pauperis. The appeal will be submitted to a panel for determination under 28 U.S.C. Section 1915(e)(2) or for summary action under Third Circuit L.A.R. 27.4 and I.O.P. 10.6. Appellant may submit argument, not to exceed 5 pages, in support of the appeal. The document, with certificate of service, must be filed with the clerk within 21 days of the date of this order, filed. Panel ID FCO-165. (MB) |

\* \* \* \* \*



04/12/2012 SUBMITTED for possible dismissal pursuant to 1915(e) or summary action, counsel motions and support. Panel ID: ALD-155. Coram: SLOVITER, FISHER and WEIS, Circuit Judges. (MB)

04/23/2012 NOT PRECEDENTIAL PER CURIAM OPINION Coram: SLOVITER, FISHER and WEIS, Circuit Judges. Total pages: 5. ALD-155. Millbrook's motions for appointment of counsel are denied.

04/23/2012 JUDGMENT, Affirmed. (MB)

\* \* \* \* \*

06/14/2012 MANDATE ISSUED, filed. (MB)

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF  
PENNSYLVANIA (SCRANTON)

No. 3:11-cv-00131-WJN-JVW

KIM MILLBROOK, PLAINTIFF

*v.*

UNITED STATES OF AMERICA, DEFENDANT

**DOCKET ENTRIES**

| DATE       | DOCKET<br>NUMBER | PROCEEDINGS                                                                                                                                                                                |
|------------|------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 01/18/2011 | 1                | COMPLAINT against United States Of America, filed by Kim Millbrook (lh)                                                                                                                    |
|            |                  | * * * * *                                                                                                                                                                                  |
| 01/20/2011 | 4                | STANDING PRACTICE ORDER sent to prisoner on 1/20/11 (lh)                                                                                                                                   |
|            |                  | * * * * *                                                                                                                                                                                  |
| 01/20/2011 | 6                | ORDER granting <u>2</u> Motion for Leave to Proceed in forma pauperis. The USM is directed to serve the complaint on the Defendant. Signed by Honorable William J. Nealon on 2/1/2011 (bg) |
|            |                  | * * * * *                                                                                                                                                                                  |
| 04/08/2011 | 9                | MOTION to Dismiss <i>or in the alternative</i> , MOTION for                                                                                                                                |

Summary Judgment by  
United States of America.  
(Attachments: #1 Proposed  
Order) (Thiel, G.)

04/08/2011 10 MOTION to Seal and to  
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Declaration in Camera filed  
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(Attachments: #1 Proposed  
Order) (aaa)

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10 MOTION to Seal filed by  
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(aaa) Modified on 4/8/2011 to  
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\* \* \* \* \*

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ther details) Signed by Hon-  
orable William J. Nealon on  
4/11/11 (ga)

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re: 9 MOTION to Dismiss *or*  
*in the alternative* MOTION  
for Summary Judgment by  
United States of America  
(Attachments: #1 Exhib-  
its(s)) (Thiel, G.)

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\* \* \* \* \*

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\* \* \* \* \*

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United States Of America.  
(Thiel, G.)

\* \* \* \* \*

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2/16/12. (ga)

02/16/2012 37 ORDER - Plaintiff's motion  
(Doc. 24) for summary judg-  
ment is DEEMED  
WITHDRAWN. Defendant's  
dispositive motion is con-  
strued as solely seeking en-  
try of summary judgment.  
The Defendant's motion for  
summary judgment (Doc. 9)  
is GRANTED. The Clerk of  
the Court is directed to  
CLOSE this case. Signed by  
Honorable William J. Nealon  
on 2/16/12. (ga)

02/24/2012

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NOTICE OF APPEAL in PRISONER Case as to 37 Order (memorandum filed previously as separate docket entry), Order (memorandum filed previously as separate docket entry) by Kim Millbrook. Filing Fee and Docket Fee NOT PAID. Filing fee \$455. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (ga)

\* \* \* \* \*

11/08/2012

43

MOTION to Lift in Part this Court's Sealing Order of 4/11/11 filed by United States Of America. (Attachments: #1 Proposed Order) (aaa)

11/08/2012

44

DOCUMENT(S) PENDING SEALING DECISION. (Attachments: #1 Order) (aaa)

\* \* \* \* \*

11/09/2012

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ORDER granting 43 Motion. (See order for deatils) Signed by Honorable William J. Nealon on 11/9/2012 (cw)



11/14/2012

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Redacted Attachments by  
United States Of America. 46  
Order on Motion to Unseal.  
(Thiel, G.)

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

Kim Millbrook  
Plaintiff

vs.

Civil No. 11-131

United States of America  
Defendants.

COMPLAINT

I. PRELIMINARY STATEMENT

This is a civil action filed pursuant to 28 U.S.C. § 1346(b), FEDERAL TORT CLAIMS ACT, against the UNITED STATES by Kim Millbrook, Federal Register No. 13700-026, a federal prisoner. In this Complaint, Plaintiff hereby alleges federal employees of Lewisburg U.S.P., acting within the scope of their ministerial duties, and these federal employees, who owed Plaintiff a Duty of care, breached this Duty by their negligence in failing to exercise reasonable care to protect Plaintiff. As a result of these federal employee's negligence in the performance of a non-discretionary function, Plaintiff suffered physical injury, specifically was sexually assaulted and battered.

II. JURISDICTIONAL AND VENUE

The Federal Tort Claims Act, 28 U.S.C. § 1346(b) allows prisoner to sue the United States for injuries they suffer while incarcerated in Federal Prison. This court has Jurisdiction over the place the tort occurred, U.S.P. Lewisburg, Lewisburg Pennsylvania 17837. Plaintiff is a federal prisoner, and the injury was caused by federal

employee's negligence in a non-discretionary function, within the scope of their employment. Further the United States, if it were a private person would be held responsible under the laws of Pennsylvania where the tort occurred.

Additionally pursuant to the F.T.C.A. 28 U.S.C. Section 1346(b), 2671 et seq. the nature of Plaintiff's tort claim arises under the Authority of *Farmer v. Brennan* 511 U.S. 825 (1995); Federal Law section 2243 of Title 18 of the United States Code 18 U.S.C. § 2243 criminalizes sexual intercourse or any type of sexual contact between persons with "custodial, supervisory or disciplinary" authority and prisoners in federal correctional facilities, Section 2241 makes it a felony to use or threaten force to engage in sexual intercourse in federal prisons under the Authority of the Stop Prison Rape Elimination Act of 2003. This claim is for damages, and injunctive relief, that Plaintiff suffered physical injury due to negligence of federal prison employees.

### III. PARTIES

**PLAINTIFF** – Kim Millbrook, Federal Register No. 13700-026 was at all times relevant to the Complaint a federal prisoner incarcerated at U.S.P. Lewisburg, Pennsylvania. Plaintiff currently is incarcerated at the address listed as follows: Kim Millbrook #13700-026, U.S.P. Lewisburg, P.O. Box 1000, Lewisburg, PA 17837.

**DEFENDANT** – Defendants in this civil action authorized by the F.T.C.A. is the United States. For the F.T.C.A. makes the government in this instance the United States liable under the doctrine of *repondeat superior*. For pursuant to 28 U.S.C. § 1346(b), lawsuits may be brought against the United States for property damage, personal injury, or death caused by negligent or wrongful act or omission of any employee of the Govern-

ment while acting within the scope of his office or employment.

#### IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Before an F.T.C.A. lawsuit may be filed in federal court, one must file an administrative claim with the federal agency, 28 U.S.C. 2675(a). This administrative claim is filed by submitting a standard form as with the necessary information to the Regional Counsel Federal B.O.P., at the Regional Office where the injury happened 28 C.F.R. § 543.31(c). If the agency does not make a final decision within six (6) months, then you can consider the non-response as a denial and proceed to file a F.T.C.A. lawsuit in Federal District Court 28 U.S.C. § 2675(a); Plaintiff on July 8<sup>th</sup> 2010 filed a tort claim F.T.C.A. for damages with the F.B.O.P. This claim was assigned no. TRT-NER-2010-05381, see Attached Receipt dated July 8<sup>th</sup> 2010. Plaintiff claim for damages was denied. See Attached Notification dated December 29, 2010. Plaintiff further pursued administrative relief at ALL (3) levels of B.O.P. administrative review and no relief was granted.

#### V. PREVIOUS LAWSUITS

Plaintiff has filed a couple of lawsuits, which was a 1983 and a Bivens action, also Federal Tort Claims in the Central District of Illinois and Southern District of Indiana, Don't remember case name, number nor judges.

#### VI. STATEMENT OF CLAIM

On or about March 5<sup>th</sup> 2010 Plaintiff was taken down in the basement of Lewisburg U.S.P. SMU Program and forced to perform oral sex on a correctional officer Pealer while correctional officer Edinger held me around my neck in a choke hold. Another correctional officer Gimberling stood watch by the door, they told me that if I did

not do as they said they would kill me. Another inmate was brought down and he heard Pealer tell me if I did not shut my mouth he would make me such his dick again, due to me asking them "Why did they do what they did to me"? The witness name was Weber. I was sexually assaulted and battered maliciously with evil intent by officers Pealer, Edinger, and Gimberling, and purpose resulting in life time damages and injury further causing Plaintiff to suffer Post Traumatic Stress Dis-order. These correctional officer knew the layout of the prison due to no video footage but Plaintiff did report the incident to medical staff and special investigative staff (S.I.S.). And Warden of Prison, this is a claim of sexual assault and battery and negligent, see Attached Declaration dated 1-17-10 under F.R.C.P. Rule 10(e).

## VII. RELIEF

Plaintiff respectfully requests the following:

1) The Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and continue to be irreparably injured by the conduct of the defendant unless this court frants the declaratory and injunctive relief which Plaintiffs seeks, to be transferred to a safe environment. Due to threats and harassment by Defendants, my life is in imminent danger.

2) Compensatory damages in the amount of \$1.5 million against Defendant.

3) Declaratory Judgment that defendant is liable to Plaintiff for monetary for the cause of action alleged in the Complaint.

4) Reasonable attorney's fees and cost for this action.

1-17-11  
DATE

Respectfully submitted  
Kim Millbrook  
13700-026  
U.S.P. Lewisburg  
P.O. Box 1000  
Lewisburg

DECLARATION

I, Kim Millbrook, declare under the penalty of perjury that these said statements are true and correct as follows:

On March 1<sup>st</sup> 2010 I came to Lewisburg SMU Program from the Terre Haute USP Indiana due to retaliation circumstances from staff officials filing false reports. And me being brutally attacked and sexually assaulted by staff officials in Terre Haute. This has been reported and numerous complaints written on subject to Central Counsel in Washington D.C.

Since my arrival here in Lewisburg I told Warden Bledsoe, Captain Trate, Special Investigator Perrin, and numerous staff my life is in danger from gang member the Gangster Disciples, Skin heads, Vice Lords, D.C. members for being a snitch.

Since then March 5<sup>th</sup> 2010 I have been sexually assaulted twice by staff and a inmate. I have been forced inside cells with known gang members of the Gangster Disciples, Vice Lords D.C. members, and many other violent inmates who have attacked me while I was still in hand restraints. This also has been reported to medical staff and numerous reports written, and visual cuts and bruises.

Staff officials are constantly telling me they are going to kill my black ass. Also they are forcing me into cells with violent inmates who want to kill me due to me being labeled a snitch for constantly writing complaints on staff here at Lewisburg U.S.P.

See Attached Response from Central Office dated June 1<sup>st</sup> 2010 and June 30<sup>th</sup> 2010.



I informed staff of my situation concerning my life being in danger and me being sexually and physically assaulted. Nothing is being done to protect me.

My life is in imminent danger constantly. Need to be moved to safer environment.

Sworn to under the penalty  
of perjury 20 U.S.C. § 1746.

Dated: 1-17-10

#13700-026

Kim Millbrook

Signed

**U.S. Department of Justice  
Federal Bureau of Prisons**

**Central Office  
Administrative  
Remedy Appeal**

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Millbrook, Kim L.

LAST NAME, FIRST NAME, MIDDLE INITIAL

13700-026

SMU

Lewisburg

REG. NO.

UNIT

INSTITUTION

**Part A – REASON FOR APPEAL**

Appealing the decision of Warden Marberry and the E. Alexander and whoever else deciding that I not be permitted to have a copy of my Special Management Unite Approval dated 9-25-09 from Terre Haute U.S.P. I'm being denied due process by not being permitted to have my own copy in my possession. Also my life has been put in extreme danger because I told staff personnel and

5-24-10

DATE

Kim Millbrook

SIGNATURE OF REQUESTER

**Part B – RESPONSE**

[date stamp] [date stamp]

\_\_\_\_\_  
DATE

\_\_\_\_\_  
GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 595017-A1

**Part C - RECEIPT**CASE NUMBER: 595017-A1

Return to: \_\_\_\_\_

\_\_\_\_\_  
LAST NAME, FIRST NAME, MIDDLE INITIAL\_\_\_\_\_  
REG. NO.\_\_\_\_\_  
UNIT\_\_\_\_\_  
INSTITUTION

SUBJECT: \_\_\_\_\_

\_\_\_\_\_  
DATE\_\_\_\_\_  
SIGNATURE OF RECIPIENT OF  
CENTRAL OFFICE APPEAL

Kim L. Millbrook #13700-026

Appeal to SMU Program

Lewisburg USP

- Continued -

Attachment

5-24-10

hearing officer and the case manager Ms. McPherson the SIS Perrin and Captain Trate at Lewisburg USP upon arrival I have a hit out on me from the gang members the Gangster Disciples, Skin Heads, and the D.C. area for being a snitch. Also I have enemies I had physical altercations with from Terre Haute USP.

Since my arrival here at Lewisburg USP SMU Program I've been placed inside cells with known gang members that made threats on my life in front of staff and was still put in a hostile environment and attacked and assault due to staff negligence.

I've also been sexually assaulted by staff officials here at Lewisburg USP on or about 3-5-10. This also reported to SIS Perrin and Captain Trate.

This and other incidents need to be investigated and staff or officers responsible need to be criminally charged with crimes and fired.

I'm asking for a copy of the decision to have me placed at Lewisburg SMU Program and all other documents concerning my placement here.

I should be immediately removed from this Program due to me already being attached and my life being in imminent danger from constant threats by inmates and staff officials, and sent to a safer environment.

---

**Administrative Remedy Number 595017-A1**

**Part B – Response**

You protest your designation to the Special Management Unit (SMU). You request to be immediately removed from the program and that you be provided copies of all SMU-related documents.

The Bureau of Prisons identified a need for SMUs to effectively manage inmate problems resulting from geographical groups and gangs, a history of serious and disruptive disciplinary infractions, inmates who committed a 100-level prohibited act after being classified as a member of a Disruptive Group or participated in, organized, or facilitated any group misconduct that adversely affected the orderly operation of a correctional facility. Accordingly, the Bureau of Prisons designates sentenced inmates to SMUs where greater management of their interaction is necessary to ensure the safety, security, or orderly operation of Bureau facilities, or protection of the public.

A review of your record indicates you received notice of the Hearing Referral for Designation to a SMU on September 14, 2009, and the hearing was on November 3, 2009. You appeared at the hearing via telephone and

made an oral statement. You also present documentary evidence or written witness statements.

The Hearing Administrator determined that you met the criteria for designation to a Special Management Unit. This finding is based on the fact that you have a history of serious and disruptive disciplinary infractions and otherwise participated in or were associated with activity such that greater management of your interaction with other persons is necessary to ensure the safety, security, or orderly operation of Bureau facilities, or protection of the public.

Based on our review, we concur with the Hearing Administrator's findings and the Regional Director's recommendation, which has been reviewed by the Designation and Sentence Computation Center and the Assistant Director, Correctional Programs Division, Central Office. We find your placement appropriate and consistent with the requirements of Program Statement 5217.01, Special Management Units.

You may request copies of Bureau of Prisons' records by writing to the Freedom of Information/Privacy Act Office, Federal Bureau of Prisons, 320 First St. NW, Washington, D.C. 20534.

You appeal is denied.

June 30, 2010  
Date

H. Watts  
Harrell Watts, Administrator  
National Inmate Appeals

PJS:GMTjmh

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF  
PENNSYLVANIA**

**KIM MILLBROOK, : CIVIL NO. 3:11-CV-131**  
**Plaintiff :**   
**v. : (Nealon, J.)**  
**UNITED STATES OF :**   
**AMERICA, :**   
**Defendant : Filed Electronically**

**DEFENDANTS' STATEMENT OF MATERIAL  
FACTS IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

Defendant, the United States of America, pursuant to Local Rule 56.1, hereby submits the following statement of material facts in support of its motion for summary judgment. Plaintiff, Millbrook ("Millbrook") is advised that pursuant to Local Rule 56.1, all facts set forth in this statement will be deemed admitted unless controverted by Millbrook with references to the record supporting his position.

1. On August 13, 2007, Millbrook was sentenced in the United States District Court, Central District of Illinois to a term of 372 months incarceration for charges relating to felon in possession of a firearm, possession with intent to distribute crack cocaine, witness tampering and witness retaliation. See Declaration of Michael S. Romano (Ex. 1) ¶ 2; Public Information Inmate Sheet (Attach. E).

2. Millbrook was committed to the Bureau of Prisons on September 13, 2007. Id.

3. Millbrook's projected release date is September 4, 2033, via good conduct time release. Id.

### **Allegations in Complaint**

4. Millbrook alleges that the Defendant by its agent, Bureau of Prisons and staff, was negligent in allowing a staff member to force Millbrook to perform oral sex on him while other staff held Millbrook in a choke hold. See Doc. 1, Compl.

### **Facts Regarding Alleged Incident**

5. On March 4, 2010, at approximately 4:45 a.m. Millbrook was involved in an altercation with his cell mate. Id. ¶ 3; Memorandum from Captain Trate Attach. A) (submitted *in camera*).

6. Both inmates submitted to restraints and were removed from their cell. Id.

7. Millbrook and his cell mate were separated and placed in holding areas pending injury assessment and photographs. Id.

8. Later that morning, an unrelated mass search of the housing unit occurred. Id. ¶ 4; Staff Affidavits (Attachments. B, C) (submitted *in camera*).

9. The search was in no way related to Millbrook being placed in a holding cell. Id.

10. The next day, March 5, 2010, Millbrook made allegations of sexual assault against staff. Id. ¶ 5; OIG Reports w/ attachments (Attach. D) (submitted *in camera*).

11. The matter was investigated and was determined to be unsubstantiated. Id.



Respectfully submitted,

PETER J. SMITH

United States Attorney

s/ G. Michael Thiel

G. MICHAEL THIEL

Assistant U.S. Attorney

PA 72926

JOANNE M. HOFFMAN

Paralegal Specialist

U.S. Attorney's Office

228 Walnut Street, 2<sup>nd</sup> Floor

P.O. Box 11754

Harrisburg, PA 17108

Phone: 717-221-4482

Fax: 717-221-2246

Dated: April 12, 2011

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

|                         |   |                        |
|-------------------------|---|------------------------|
| <b>KIM MILLBROOK,</b>   | ) |                        |
| <b>Plaintiff</b>        | ) | <b>CIVIL ACTION</b>    |
| <b>v.</b>               | ) | <b>NO. 3:CV-11-131</b> |
| <b>UNITED STATES OF</b> | ) |                        |
| <b>AMERICA</b>          | ) |                        |
| <b>Defendant</b>        | ) |                        |

**DECLARATION OF MICHAEL S. ROMANO**

1. I am currently employed by the Federal Bureau of Prisons (hereafter "BOP"), and assigned to the United States Penitentiary, Lewisburg, PA (hereafter "USP Lewisburg"). I began employment with BOP in 1991 as a Correctional Officer and was in that capacity through 2000. I returned to the Bureau of Prisons in May, 2006, as an Attorney Advisor. I remain in the capacity of Attorney Advisor assigned to USP Lewisburg. As a part of my duties and responsibilities, I have access to inmates' records, electronic data maintained on the BOP's SENTRY computer system, Administrative Remedy data, BOP Program Statements, and PACER. I certify that the Attachments referenced herein are true and accurate to the best of my knowledge.

2. The Plaintiff, inmate Kim Millbrook, federal register number 13700-026, is a federal inmate currently incarcerated at the USP Lewisburg. On August 13, 2007, Plaintiff was sentenced in the United States District Court, Central District of Illinois to a term of 372 months incarceration for charges related to felon in possession of a firearm, possession with intent to distribute crack cocaine, witness tampering and witness retaliation. He was committed on September 14, 2007. His projected release

date is September 4, 2033, via good conduct release. See Attachment E

3. On March 4, 2010, at approximately 4:45 a.m. Plaintiff was involved in an altercation with his cell mate. Both inmates submitted to restraints and were removed from their cell. They were separated and placed in holding areas pending injury assessment and photographs. See Attachment A

4. Later that morning, a mass search of the housing unit occurred. The search was in no way related to the Plaintiff being placed in a holding cell. See Attachments B, C

5. The Plaintiff made allegations of sexual assault (issue in this case) on March 5, 2010. The matter was investigated and was determined to be unsubstantiated. See Attachment D

I declare under penalty of perjury pursuant to 28, United States Code, Section 1746, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 14<sup>th</sup> day of March, 2011

Michael S. Romano

Michael S. Romano

Attorney Advisor

USP Lewisburg

## Attachment A

UNITED STATES GOVERNMENT  
MEMORANDUM*United States Penitentiary  
Lewisburg, Pennsylvania 17837*

March 04, 2010

**MEMORANDUM FOR B. TRATE, CAPTAIN**

From: William J. McFadden, Lieutenant  
Subject: Suspected inmate cell fight (G-Blk, cell 122)  
[#1]  
Millbrook, Kim #13700-026

On March 4, 2010, at approximately 4:45 a.m., I was contacted by the M/W G-1, #1 Officer (Wheeland). Wheeland informed me he suspected a cell fight had transpired in cell #122, involving inmate [#1] & inmate Millbrook, Kim #13700-026. Wheeland informed me he heard a ruckus type noise on G-Block, 1<sup>st</sup> floor. Upon investigating, he discovered inmate [#1] standing at his cell door (122), displaying clothing littered with blood and stating, "I needed to get out of this cell".

Upon arrival to G-Block, cell 122; I noticed injuries to both inmates, consistent with a fight. Both inmates were compliant with the application of handcuffs and temporarily placed in shower areas, pending injury assessment and photographs.

At approximately 5 a.m.; Mr. McClintoc conducted injury assessments on both inmates. Inmate Millbrook sustained an abrasion and swelling to the left eye. Inmate [#1] suffered swelling to the right upper lip and minor abrasions to right upper arm, forehead and bridge of nose. Inmate [#1] informed McClintoc "My cellie punched me in the mouth, after putting me in a head lock;

it was just a misunderstanding". Inmate Millbrook told McClintoc "he must have punched me in the eye; there were not any weapons involved, it was just a misunderstanding".

Photographs of both inmates were completed by J. Moscarello (SIS) at approximately 5:45 a.m.

A review of Sentry indicated inmate Millbrook is labeled as a [redacted]. Also, since inmate [#1]'s arrival at USP Lewisburg on [redacted], from USP Big Sandy; he's received incident reports for Assault(3); as well as Fighting (7).

## Attachment B

U.S. Department of Justice  
Office of the Inspector General

## AFFIDAVIT

|                                                                                                                                                               |                                                            |                                                         |                                                     |                                          |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------|---------------------------------------------------------|-----------------------------------------------------|------------------------------------------|
| <b>1. Place (City, State)</b><br>USP Lewisburg                                                                                                                | <b>2. Date</b><br>8.11.10                                  | <b>3. Time</b><br>10:20 PM                              | <b>4. Case Number</b><br>2010-003997<br>2010-005083 |                                          |
| <b>Person Making Statement</b>                                                                                                                                |                                                            |                                                         |                                                     |                                          |
| <b>5. Name</b><br>Jeffrey B. Pealer                                                                                                                           | <b>6. Home Address (City and State Only)</b><br>[redacted] |                                                         | <b>7. Home Tel.</b><br>[redacted]                   |                                          |
| <b>8. Title</b><br>Correctional Officer                                                                                                                       | <b>9. Grade</b><br>GS-7                                    | <b>10. Component</b><br>BOP                             | <b>11. Length of Employ</b><br>18 years             | <b>12. Office Tel.</b><br>(570) 523-1251 |
| <b>13. Employer</b><br>USP Lewisburg                                                                                                                          |                                                            | <b>14. Office Address</b><br>P.O. Box 100 Lewisburg, PA |                                                     |                                          |
| <b>Others Present When Statement is Given</b>                                                                                                                 |                                                            |                                                         |                                                     |                                          |
| <b>15. Name</b><br>Kerwin John                                                                                                                                |                                                            | <b>16. Title</b><br>SA                                  |                                                     |                                          |
| <b>17. Name</b><br>Shaun Stanley                                                                                                                              |                                                            | <b>18. Title</b><br>SA                                  |                                                     |                                          |
| <b>19. Statement of Affiant: (Raise your right hand and repeat)</b>                                                                                           |                                                            |                                                         |                                                     |                                          |
| <i>I, <u>Jeffrey B. Pealer</u> hereby solemnly (swear) (affirm) that the statement which I am about to make shall be the truth and nothing but the truth.</i> |                                                            |                                                         |                                                     |                                          |

My name is Jeff Pealer, I am a Correctional Officer at USP Lewisburg, on March 4<sup>th</sup>, 2010 I was working as the number one officer on the 2<sup>nd</sup> floor of G-Block. I was involved in a shakedown of the whole unit. I remember moving inmate [#2] from his cell to the rec cage outside as part of my duties during the shakedown. I/M [#2] was jerking off to the females on the range so a magnet was placed over his widow and he continued to kick. As I removed him from his cell I tried to talk him down, I had a decent rapport with him. Upon instructed not to give him a coat he became irate. I then pulled him towards the rec

cage in which I placed him. I did not consider this a use of force action; therefore I did not write an incident report.

I was then instructed to take I/M [#2] to the holding cell in the basement. I wasn't sure why but I did escort him and he was compliant. I placed him in the cage and was not sure if I uncuffed him or not. I am not sure whether or not there was another I/M in the other holding cage. At no time did I physically assault I/M [#2] nor did I see anybody else assault I/M [#2].

I am familiar with I/M Millbrook because of his prida [sic] activities since his arrival. Millbrook was involved in numerous fights since his arrival. I do not remember any dealing with I/M Millbrook on the day of the shakedown. At no point did I choke him, or have him perform oral sex on me or anybody else, nor threaten to kill him.

*I have read this statement consisting of 3 page(s), and it is true and complete to the best of my knowledge and belief.*

S/ Jeffrey B. Pealer

(Affiant's Signature)

*Subscribed and (sworn to) (affirmed)*

*Before me at*

*On this 11<sup>th</sup> day of*

August, 2010

S// Kerwin John

(Investigator's Signature)

S// Shaun E. Stanley

(Investigator's Signature)



## Attachment C

**U.S. Department of Justice**  
**Office of the Inspector General**

**AFFIDAVIT**

|                                                                                                                                                        |                                                            |                                                                          |                                      |                        |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------|--------------------------------------------------------------------------|--------------------------------------|------------------------|
| <b>1. Place (City, State)</b><br>Lewisburg, PA                                                                                                         | <b>2. Date</b><br>6/3/10                                   | <b>3. Time</b><br>8:15 AM                                                | <b>4. Case Number</b><br>2010-005083 |                        |
| <b>Person Making Statement</b>                                                                                                                         |                                                            |                                                                          |                                      |                        |
| <b>5. Name</b><br>Brian Wert                                                                                                                           | <b>6. Home Address (City and State Only)</b><br>[redacted] |                                                                          | <b>7. Home Tel.</b><br>[redacted]    |                        |
| <b>8. Title</b><br>Correctional Officer                                                                                                                | <b>9. Grade</b><br>7-3                                     | <b>10. Component</b><br>BOP                                              | <b>11. Length of Employ</b><br>2yrs  | <b>12. Office Tel.</b> |
| <b>13. Employer</b><br>USP Lewisburg                                                                                                                   |                                                            | <b>14. Office Address</b><br>Robert F. Miller Drive, Lewisburg, PA 17837 |                                      |                        |
| <b>Others Present When Statement is Given</b>                                                                                                          |                                                            |                                                                          |                                      |                        |
| <b>15. Name</b><br>David Bartlett                                                                                                                      |                                                            | <b>16. Title</b><br>SOS Union President                                  |                                      |                        |
| <b>17. Name</b><br>Shaun Stanley                                                                                                                       |                                                            | <b>18. Title</b><br>Special Agent                                        |                                      |                        |
| <b>19. Statement of Affiant: (Raise your right hand and repeat)</b>                                                                                    |                                                            |                                                                          |                                      |                        |
| <i>I, <u>Brian Wert</u> hereby solemnly (swear) (affirm) that the statement which I am about to make shall be the truth and nothing but the truth.</i> |                                                            |                                                                          |                                      |                        |

I am a correctional officer for 2 years at USP Lewisburg. My job was to maintain a secure environment for the inmate population. On March 4, 2010 I was assigned to G-Unit 2<sup>nd</sup> floor officer. That morning there was a mass shakedown in that unit. I was escorting the inmates from their cell to the rec area and back to their cells. Jeff Pealer was the second officer assigned o the floor. To the best of my knowledge officers Zeiders and Gemberling were at the first and Kulago and D. Rogers were on the third. While escorting inmate [#3] to the rec cages I noticed commotion behind me and placed [#3] in the rec cage. I

ran over to inmate [#2] and assisting officers and grabbed the inmate's arm and pushed the inmate along into an open rec cage. That happened because Inmate [#2] was resisting the officer escorting him. In order to make room in the rec cages, we escorted inmate [#2] to a holding cage in the basement instead of his cell due to inmate [#2] masturbating female staff earlier in the shift. The inmate was secured in the holding

*I have read this statement consisting of 2 page(s), and it is true and complete to the best of my knowledge and belief.*

S// Brian Wert

(Affiant's Signature)

*Subscribed and (sworn to) (affirmed)*

*Before me at*

*On this 3<sup>rd</sup> day of*

June, 2010

S// Kerwin John

(Investigator's Signature)

S// Shaun E. Stanley

(Investigator's Signature)

[Page 2 of Affidavit omitted from district court record.]

## Attachment D

**U.S. Department of Justice**  
**Office of the Inspector General**  
**ABBREVIATED REPORT OF INVESTIGATION**

|                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>SUBJECT</b><br><br>Jeffrey B. Pealer (xxx-xx[redacted])<br>Senior Correctional Officer<br>Federal Bureau of Prisons<br>United States Penitentiary,<br>Lewisburg Pennsylvania                                                                                                 | <b>CASE NUMBER</b><br><br>2010-003997                                                                                                                                                                                                                                                                 |
| <b>OFFICE CONDUCTING INVESTIGATION</b><br><br>New York Field Office                                                                                                                                                                                                             | <b>DOJ COMPONENT</b><br><br>Federal Bureau of Prisons                                                                                                                                                                                                                                                 |
| <b>DISTRIBUTION</b><br><br><input checked="" type="checkbox"/> Field Office      NYFO<br><input checked="" type="checkbox"/> AIGINV            HQ<br><input checked="" type="checkbox"/> Component        BOP<br><input type="checkbox"/> USA<br><input type="checkbox"/> Other | <b>STATUS</b><br><br><input type="checkbox"/> OPEN<br><input type="checkbox"/> OPEN PENDING PROSECUTION<br><input checked="" type="checkbox"/> CLOSED<br><br><b>PREVIOUS REPORT SUBMITTED:</b><br><br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO<br>Date of Previous Report: |

**SYNOPSIS**

This Office of the Inspector General (OIG) investigation was initiated based upon information forwarded from the Federal Bureau of Prisons (BOP) alleging that Senior Correctional Officer Jeffrey Pealer and another unidentified officer physically and sexually assaulted Inmate Kim Millbrook, Register Number 13700-026. According to BOP, Millbrook alleges that he was physically and sexually assaulted on March 4, 2010, during an area search (shake down) of his housing unit G at the United States Penitentiary (USP) in Lewisburg, Pennsylvania.

When interviewed by the OIG, Millbrook reiterated his allegations and claimed that Inmate [#2], Register # [redacted], witnessed the assault.

The OIG investigation did not substantiate Millbrook's allegations.

The OIG interviewed [#2] who reported that he did not witness Pealer or any other BOP employee assault Millbrook on March 4, 2010, in the basement area of housing unit G. Of particular note, is that [#2] interviewed as a victim and was very cooperative because OIG was also investigating allegations that he was assaulted by Pealer. Although [#2] was cooperative, the OIG investigation (OIG Case 2010-003997) did not find any evidence to support the allegations that Pealer assaulted [#2].

The OIG attempted to obtain video from the basement area where Millbrook alleged he was assaulted, however, there were no cameras. Since the incident, USP Lewisburg has [redacted] in the [redacted] and the [redacted] area.

The OIG also interviewed several correctional officers who participated in the area search of Millbrook's housing unit on March 4, 2010. None of the witnesses interviewed reported seeing Pealer or any other BOP employee use excessive force against Millbrook or sexually assault him at any time. In addition, a BOP Psychological Evaluation Report prepared by Staff Psychologist Kimberly Turner and dated March 5, 2010, disclosed that Millbrook has a history of making allegations that he was sexually assaulted by BOP staff.

One June 3, 2010, the OIG presented the facts in this case to Assistant United States Attorney Fred Martin in the Middle District of Pennsylvania. Martin declined the matter for criminal prosecution.

On August 11, 2003, the OIG conducted an administrative (compelled) interview of Pealer. During the interview, Pealer provided a signed sworn affidavit denying that he

physically or sexually assaulted Millbrook on March 4, 2010.

The OIG has completed its investigation and is providing this report to the BOP for its review.

### **List of Exhibits**

1. U.S. Department of Justice, Office of the Inspector General (OIG) Memorandum of Investigation (MOI) dated April 26, 2010, relating to the receipt and review of the DOJ OIG complaint form and predicated material, with attachments.
2. MOI dated June 7, 2010, relating to the declination of prosecution.
3. MOI dated June 9, 2010, relating to the interview of Senior Correctional Officer Brian Wert, with attachments.
4. MOI dated June 9, 2010, relating to the interview of Correctional Officer Kevin Gemberling, with attachments.
5. MOI dated June 9, 2010, relating to the interview of Physician Assistant Kenneth Zook, with attachments.
6. MOI dated June 9, 2010, relating to the interview of Senior Officer Specialist Stewart Zeiders, with attachments.
7. MOI dated June 9, 2010, relating to the interview of Lieutenant Matthew Edinger, with attachments.
8. MOI dated June 9, 2010, relating to the interview of Senior Correctional Officer David Rodgers, with attachments.
9. MOI dated August 12, 2010, relating to the interview of Correctional Officer George Kulago.

10. MOI dated August 13, 2010, relating to the interview of Senior Correctional Officer Jeffrey Pealer, with attachments.

11. MOI dated August 23, 2010, relating to the interview of Lieutenant Thomas Johnson, with attachments.

|                                              |                                  |
|----------------------------------------------|----------------------------------|
| DATE Sep 30 2010                             | SIGNATURE /s/ Kerwin John        |
| PREPARED BY SPECIAL AGENT Kerwin A. John     |                                  |
| DATE Sep 30 2010                             | SIGNATURE /s/ James E. Tomlinson |
| PREPARED BY SPECIAL AGENT James E. Tomlinson |                                  |



U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
USP LEWISBURG, PENNSYLVANIA

---

A F F I D A V I T

County of Union

:SS

State of Pennsylvania

I, Kim Millbrook, Reg. No. 13700-026, of USP Lewisburg, Pennsylvania, make this statement freely without any promises or assurances:

1. I am an inmate incarcerated at the Federal Penitentiary, Lewisburg, Pennsylvania.

2. That on March 2010, I was sexually assaulted by Officer Peeler and two other staff members whose names I don't know.

3. That I got into a fight with my cellmate and was removed from my cell in G-Block on the morning watch sometime. I was originally placed in a shower on the first floor after the fight and a short time later Officer Peeler came to the shower and stated, "I was mouthing off to staff and We are going to show you what Lewisburg is all about." Some other officer then came and Peeler placed handcuffs on me and removed me from the shower.

4. That Officer Peeler then took me down to the basement and I didn't have a shirt or socks on. Peeler then put me into a holding cell in the basement and Peeler told me to stick my arms back out of the wicket and he pulled on me a little and took the handcuffs off. Peeler then left and I was in the holding cell uncuffed.



5. That about a half hour later, Peeler came back with two other officers, a blonde and a brunette. The brunette then stood at the door and held it closed and Officer Peeler and the blonde came over to the cell. The blonde told me to get up and turn around and put my hands back out the cage. They told me back out of the cage and the blonde officer grabbed me around the neck and started choking me very hard to the point of me almost passing out. Peeler then told me to get down on my knees, and unzipped his pants and told me to "suck his dick."

6. That I sucked his dick out of fear for my life and he ejaculated in my mouth and I swallowed. When I was done sucking his dick, they put me back in the cage, and the blonde haired one called me a [redacted] bitch, running from [redacted] from Moline, Ill, you was in Terre haute getting your ass kicked and now you're here getting your ass kicked, for the [redacted] and Peeler said if you say anything to anyone we are gonna kill you.

7. That I informed PA [illegible] they were trying to kill me and he told me to be quiet and walked away.

8. That a short time later, the same officers brought down an inmate by the name of [#2] and started to rough him up. I then asked why they were doing us like this and Peeler stated shut up Millbrook before I make you suck my dick again.

9. That I am willing to take a polygraph on the entire incident.

"////////// END OF STATEMENT //////////"

### OATH

I declare, under the pain and penalty of perjury, that the foregoing statement consisting of 2 page(s) is true and accurate to the best of my knowledge and belief.

/s/ Kim Millbrook

**AFFIANT**

*Subscribed and sworn to before me this 5th day of March, 2010.*

*Authorized by 5 U.S.C. 303  
to Administer Oaths*

*/s/*

**James Fosnot  
Special Investigative Supervisor  
Federal Bureau of Prisons  
USP Lewisburg**

**Bureau of Prisons  
Health Services  
Clinical Encounter**

---

Inmate Name: MILLBROOK, KIM LEE  
Reg #: 13700-026                      Date of Birth: [redacted]  
Sex: M                                      Race: BLACK  
Encounter Date: 03/05/2010 09:30  
Provider: Pigos, Kevin MD/Clinical  
Facility: LEW

---

Chronic Care encounter performed at Health Services.

**SUBJECTIVE:**

|                    |                  |                                         |
|--------------------|------------------|-----------------------------------------|
| <b>COMPLAINT 1</b> | <b>Provider:</b> | Pigos, Kevin<br>MD/Clinical<br>Director |
|--------------------|------------------|-----------------------------------------|

**Chief Complaint:** Other Problem

**Subjective:** Pt claims he was sexually assaulted by 3 staff members. This occurred yesterday after his fight with cellmate. He states he was taken to the showers and down to the holding cell in the basement. There he states one officer told him "this is how we do things in Lewisburg". He had his cuffs removed and was choked until he almost lost consciousness. Then an officer told him to perform oral sex. The inmate states he swallowed the ejaculation and was told if he tells anyone they would kill him. This story was repeat 3 times in the presence of SIA Perrin and Capt. Traite. The details of when this occurred (at what time of day) changed with each telling.

After the interview was conduct his CIC appointment was performed. States his medicines seem to

be working well and he has no complaints or concerns except that he is certain he has a parasite inside him. He can feel it moving in his belly and spit up a bit of blood one time.

**Pain Location:**

**Pain Scale:** 0

**Pain Qualities:**

**History of Trauma:** No

**Onset:**

**Duration:**

**Exacerbating Factors:**

**Relieving Factors:**

**Comments:**

**Seen for clinic(s):** Endocrine/Lipid, Hypertension, Mental Health

**ROS:**

**General**

**Constitutional Symptoms**

Anorexia (no), Chills (no), Fatigue (no), Fever (no)

**Psychiatric**

**General**

Anxiety-Mild (no), Appetite-Normal (yes), Concentration-Normal (yes), Energy-Normal (yes), Hallucinations-Auditory (no), Hallucinations-Olfactory (no), Hallucinations-Tactile (no), Hallucinations-Visual (no), Homicide/Other Harm Thoughts (no), Memory-

Normal (yes), Mood-Normal (yes), Sleep-Normal (yes), Suicide/Self-Harm Thoughts (no)

## OBJECTIVE:

### Pulse:

|                 |               |                             |
|-----------------|---------------|-----------------------------|
| <u>Date</u>     | <u>Time</u>   | <u>Rate Per Minute</u>      |
| 03/05/2010      | 09:30 LEW     | 81                          |
| <u>Location</u> | <u>Rhythm</u> | <u>Provider</u>             |
| Brachial        | Regular       | Pigos, Kevin<br>MD/Clinical |

### Blood Pressure:

|                          |                 |                  |
|--------------------------|-----------------|------------------|
| <u>Date</u>              | <u>Time</u>     | <u>Value</u>     |
| 03/05/2010               | 09:30 LEW       | 140/88           |
| <u>Location</u>          | <u>Position</u> | <u>Cuff Size</u> |
| Right Arm                | Sitting         | Adult-large      |
| <u>Provider</u>          |                 |                  |
| Pigos, Kevin MD/Clinical |                 |                  |

### Exam:

#### Diagnostics

##### Laboratory

Results (yes)

1/10 – lab wnl, including no elevated eosinophils

#### General

##### Appearance/Nutrition

Appears Well (yes), NAD (yes), WD/WN (yes), Alert and Oriented x 3 (yes)

Resolving ecchymosis and hematoma around left eye from cell fight day before. Neck had no signs of bruising or abrasions. Shirt was pulled up over head on examination.

## **Pulmonary**

### **Auscultation**

Clear to Auscultation Bilaterally (yes)

## **Cardiovascular**

### **Auscultation**

Regular Rate and Rhythm (RRR) (yes)

## **ASSESSMENT:**

| <u>Description</u> | <u>ICD9</u>     | <u>Status</u> |
|--------------------|-----------------|---------------|
| [redacted]         | [redacted]      | [redacted]    |
| [redacted]         | [redacted]      | [redacted]    |
| [redacted]         | [redacted]      | [redacted]    |
| <u>Status Date</u> | <u>Progress</u> | <u>Type</u>   |
| 04/27/2009         | [redacted]      | [redacted]    |
| 05/26/2008         | [redacted]      | [redacted]    |
| 05/26/2008         | [redacted]      | [redacted]    |

## **PLAN:**

### **New Medication Orders:**

| <u>Rx#</u> | <u>Medication</u> | <u>Order Date</u> | <u>Prescriber Order</u> |
|------------|-------------------|-------------------|-------------------------|
|            | Lisinopril        | 03/05/2010        | 40 mg Orally Mouth      |
|            | Tablet            | 09:30             | daily x 180 day(s)      |

**Indication:** Unspecified essential hypertension

### **Renew Medication Orders:**

| <u>Rx#</u>                                                                                            | <u>Medication</u>                     | <u>Order Date</u> | <u>Prescriber Order</u>                                                             |
|-------------------------------------------------------------------------------------------------------|---------------------------------------|-------------------|-------------------------------------------------------------------------------------|
| 40471-<br>LEW                                                                                         | Acetomenophen<br>325 MG Tab           | 03/05/2010 09:30  | ***pill line*** Take three<br>tablets by mouth twice daily<br>as needed x 60 day(s) |
| <b>Indication:</b> Pain in joint, hand, Other specified examination                                   |                                       |                   |                                                                                     |
| 40472-<br>LEW                                                                                         | Aspirin<br>81 MG EC Tab               | 03/05/2010 09:30  | ***pill line*** Take one tablet<br>by mouth each morning x 180<br>day(s)            |
| <b>Indication:</b> Unspecified essential hypertension                                                 |                                       |                   |                                                                                     |
| 40475-<br>LEW                                                                                         | Hydrochloro-<br>thiazide<br>25 MG Tab | 03/05/2010 09:30  | ***pill line*** Take one tablet<br>by mouth each morning x 180<br>day(s)            |
| <b>Indication:</b> Unspecified essential hypertension                                                 |                                       |                   |                                                                                     |
| 40477-<br>LEW                                                                                         | Ranitidine<br>300 MG Tab              | 03/05/2010 09:30  | ***pill line*** Take one tablet<br>by mouth twice daily x 180<br>day(s)             |
| <b>Indication:</b> Hemoptysis                                                                         |                                       |                   |                                                                                     |
| 40478-<br>LEW                                                                                         | Sertraline HCl<br>50 MG Tab           | 03/05/2010 09:30  | ***pill line*** Take one tablet<br>by mouth each evening x 180<br>days              |
| <b>Indication:</b> Axis II: Antisocial personality disorder, Axis I:<br>Bipolar disorder, unspecified |                                       |                   |                                                                                     |

### **Discontinued Medication Orders:**

| <u>Rx#</u> | <u>Medication</u> | <u>Order Date</u> | <u>Prescriber Order</u> |
|------------|-------------------|-------------------|-------------------------|
| [redacted] |                   |                   |                         |

### **Discontinued Laboratory Requests:**

| <u>Details</u> | <u>Frequency</u> | <u>End Date</u> |
|----------------|------------------|-----------------|
| [redacted]     | [redacted]       | [redacted]      |
| [redacted]     | [redacted]       | [redacted]      |
| [redacted]     | [redacted]       | [redacted]      |
| [redacted]     | [redacted]       | [redacted]      |



**Due Date**

02/19/2010 00:00

07/30/2010 00:00

04/28/2010 00:00

08/19/2010 00:00

**Priority**

[redacted]

[redacted]

[redacted]

[redacted]

**Discontinued Radiology Request Orders:****Details**

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

**Frequency**

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

**End Date**

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

**Due Date**

12/18/2008

03/26/2009

09/05/2008

12/02/2009

12/24/2009

03/11/2009

05/27/2008

**Priority**

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

**Discontinued Consultation Requests:****Consultation/Procedure**

[redacted]

[redacted]

[redacted]

**Due Date**

10/29/2009

12/04/2009

12/04/2009

**Priority**

[redacted]

[redacted]

[redacted]

**Translator**

No

No

No

**Language**

**Schedule:**

| <u>Activity</u>          | <u>Date Scheduled</u> | <u>Scheduled Provider</u> |
|--------------------------|-----------------------|---------------------------|
| Chronic<br>Care<br>Visit | 06/07/2010 00:00      | Mid-Level Provider        |

**Disposition:**

Follow-up at Sick Call as Needed

Follow-up in 3 Months

**Other:**

No evidence of any parasite infection. Review of chart shows this to be a chronic complaint in the past. No evidence of any trauma to his neck in the reported choking. Per psychology he has a report of staff sexually assualting him at a previous institution almost identical to the current accusation. Given the inability to recover evidence from oral penetration after this reported time frame (pt says he did not tell anyone out of fear yesterday) there is no value to send him to the outside hospital for a sexual assault evaluation.

**Patient Education Topics:**

| <u>Date Initiated</u> | <u>Format</u> | <u>Handout/Topic</u> |
|-----------------------|---------------|----------------------|
| 03/05/2010            | Counseling    | Plan of Care         |

| <u>Provider</u> | <u>Outcome</u>          |
|-----------------|-------------------------|
| Pigos, Kevin    | No Evidence of Learning |

pt still convinced he has bugs in him. would not accept that after coughing it is normal to have a small amount of blood in sputum.

**Copay Required:** No      **Cosign Required:** No  
**Telephone/Verbal Order:** No

Completed by Pigos, Kevin MD/Clinical Director on  
03/05/2010 15:09

**Federal Bureau of Prisons  
Psychology Data System**

**Date-Title:** 03-05-2010 – Eval/Rpt –  
Sexual Abuse Prevention /  
Intervention

**Reg Number-Name:** 13700-206 – MILLBROOK,  
KIM L. Unit/Qtrs:  
BREWER SMU, G01-108L

**Author:** KIMBERLY E. TURNER,  
STAFF PSYCH

**Institution:** LEW – LEWISBURG USP

---

**Reason for Referral:** On this date Psychology Services was notified by Health Services of inmate MILLBROOK's allegation that he was sexually assaulted by correctional staff at USP Lewisburg. The inmate was removed from his cell on G-block and assessed for medical trauma. He was then interviewed by the SIS Lieutenant. Following those events, this writer interviewed Millbrook at approximately 1000 in the SIS office.

**Findings:** A review of this inmate's PDS record reveals [redacted].

The following is an account of the events according to inmate Millbrook. Shortly after midnight on March 4, 2010, this inmate got into a physical altercation with his cellmate. After this incident, he was handcuffed and placed in the shower cell for an unspecified period of time. Two officers "a blonde one and a brunette one with gray in his hair" placed him in hand restraints and escorted him to the G block basement to a holding cell. He said one of the officers made the statement, "I'm going to show you how we do things at Lewisburg," and the blonde officer began choking him from behind. At that time, the other officer unzipped his pants and told him to

"suck my dick." Millbrook indicated he complied with the officer, performing oral sex on him until he ejaculated into his mouth. The inmate stated he was then left in the basement holding cell of G block for several additional hours until he was taken and placed in another holding cell on the unit. He said he was "too scared" to come forward to tell anyone for the past 24 hours; but this morning he said, "I just knew I had to tell somebody what happened to me."

Millbrook was asked about previous incidences of sexual assault. He indicated several officers had assaulted him at USP Terre Haute a few months ago. According to his PDS records, a psychologist evaluated him for psychological trauma following what sounds like a very similar incident in July 2009. This report indicated Millbrook alleged three correctional officers removed him from his cell. He said he was choked by one of the officers while another penetrated his anus with his fingers. The results of this investigation are unknown.

**Current Mental Status:** Millbrook presented as alert, oriented, and attentive. He described his mood as "scared," but he appeared very talkative and willing to cooperate and answer questions presented to him. He also appeared somewhat angry and irritable. There was no evidence of thought disorganization, perceptual disturbances, inappropriate or pathological paranoia, or delusional thinking. He reported having difficulty sleeping the previous night; however, he denied physiological signs or symptoms of anxiety. He currently takes antidepressant medication, and he did not report a significant increase in depressive symptoms since this incident. When asked about suicidal intention, he was vague. He said, "Sometimes I might think about it but then I think of my kids and I'd never do anything like that."

In the majority of individuals with a pathological or clinically significant response to a traumatic event, the following symptoms occur: dissociative symptoms (a sense of detachment, numbness, or absence of emotional reactions), persistent re-experiencing of the traumatic event, and/or marked avoidance of stimuli that may arouse recollections of the trauma. These symptoms are likely to be particularly true for someone like this inmate who has reported experiencing a previous similar trauma. In Millbrooks's case, he does not appear to display these symptoms. On the contrary, he exhibits a strong emotional reaction (anger), and he appears to have no difficulty discussing the event in great detail with this writer, investigators, the lieutenant, the medical staff, etc. This inmate also does not appear to have marked anxiety or noticeably increased arousal.

**Plan / Follow up:** As noted above, overt symptoms of acute emotional distress or trauma-related mental health problems were not noted during this interview. Because mental status and reaction to trauma is a dynamic event that may change over time, this inmate will be re-assessed during the next week. Correctional staff will continue to observe his mental status and behavior daily.

**\*\*SENSITIVE BUT UNCLASSIFIED\*\***

## Attachment E

LEW40 \* PUBLIC INFORMATION \* 03-01-2011

PAGE 003 \* INMATE DATA \* 11:30:11

AS OF 03-01-2011

REGNO.: 13700-026 NAME: MILLBROOK, KIM LEE

RESP OF: LEW

PHONE.: 570-523-1251 FAX: 570-522-7745

-----CURRENT COMPUTATION NO: 020-----

COMPUTATION 020 WAS LAST UPDATED ON 10-08-2010 AT DSC AUTOMATICALLY

COMPUTATION CERTIFIED ON 10-08-2010 BY  
DESIG/SENTENCE COMPUTATION CTRTHE FOLLOWING JUDGMENTS, WARRANTS AND  
OBLIGATIONS ARE INCLUDED IN CURRENT  
COMPUTATION 020: 020 010

|                                      |            |
|--------------------------------------|------------|
| DATE COMPUTATION BEGAN:              | 08-13-2007 |
| TOTAL TERM IN EFFECT:                | 372 MONTHS |
| TOTAL TERM IN EFFECT<br>CONVERTED:   | 31 YEARS   |
| EARLIEST DATE OF OFFENSE:            | 01-10-2006 |
| JAIL CREDIT: FROM DATE               | THRU DATE  |
| 01-10-2006                           | 08-12-2007 |
| TOTAL PRIOR CREDIT TIME:             | 580        |
| TOTAL INOPERATIVE TIME:              | 0          |
| TOTAL GCT EARNED AND<br>PROJECTED:   | 1223       |
| TOTAL GCT EARNED:                    | 0          |
| STATUTORY RELEASE DATE<br>PROJECTED: | 09-04-2033 |
| EXPIRATION FULL TERM<br>DATE:        | 01-09-2033 |

PROJECTED SATISFACTION

DATE:

09-04-2033

PROJECTED SATISFACTION

METHOD:

GCT REL

G0002

MORE PAGES TO FOLLOW . . .



PJS:GMTjmh

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF  
PENNSYLVANIA**

|                       |   |                              |
|-----------------------|---|------------------------------|
| <b>KIM MILLBROOK,</b> | : | <b>CIVIL NO. 3:11-CV-131</b> |
| <b>Plaintiff</b>      | : |                              |
| <b>v.</b>             | : | <b>(Nealon, J.)</b>          |
| <b>UNITED STATES</b>  | : |                              |
| <b>OF AMERICA,</b>    | : |                              |
| <b>Defendant</b>      | : | <b>Filed Electronically</b>  |

**BRIEF IN SUPPORT OF DEFENDANT'S MOTION  
TO DISMISS OR, IN THE ALTERNATIVE, FOR  
SUMMARY JUDGMENT**

**I. Introduction**

Defendant, the United States of America, by and through its counsel, submit this brief in support of Defendant's Motion to Dismiss or, in the alternative, Motion for Summary Judgment. (Doc. No. 9). The Court should dismiss the Complaint because Defendant is entitled to sovereign immunity. Alternatively, the Court should enter summary judgment in favor of Defendant because Millbrook's negligence claim fails.

## II. Procedural History

Millbrook, a federal prisoner incarcerated at the United States Penitentiary in Lewisburg, Pennsylvania (“USP Lewisburg”), filed an FTCA<sup>1</sup> complaint on January 19, 2011, claiming that he was sexually assaulted by Bureau of Prison’s Staff. On February 2, 2011, the Court issued an Order directing service of the Complaint and ordering Defendants to respond within 60 days.

The United States was served with the summons and Complaint on February 4, 2011. On February 9, 2011, the United States Attorney’s Office was served with the Complaint. On April 8, 2011, Millbrook filed a Motion for Entry of Default Judgment, which Defendant opposed April 11, 2011. Also, on April 8, 2011, Defendants filed a dispositive motion, and a motion to seal documents to be used as attachments to an exhibit in support of Defendant’s Statement of Material Facts. The Court granted Defendant’s motion to seal on April 11, 2011. Defendant now files a Statement of Material Facts simultaneously with this brief in support of Defendant’s Motion to Dismiss or, in the alternative, Motion for Summary Judgment.

## III. Factual Background

### A. Millbrook’s allegations

Millbrook alleges that the Defendant by its agent, Bureau of Prisons and staff, was negligent in allowing a staff member to force Millbrook to perform oral sex on him while other staff held Millbrook in a choke hold. See Doc. 1, Compl.

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<sup>1</sup> Federal Tort Claims Act (“FTCA”), 28 U.S.C. §2671 et seq.

## **B. Defendants' statement of material facts**

Defendants have set forth the undisputed material facts in their statement of material facts (SMF) and refer the Court to that document, with its citations to the record, for a thorough statement of the facts. Nevertheless, Defendants summarize the pertinent facts here.

### **1. Facts Regarding Millbrook's Incarceration.**

On August 13, 2007, Millbrook was sentenced in the United States District Court, Central District of Illinois to a term of 372 months incarceration for charges related to felon in possession of a firearm, possession with intent to distribute crack cocaine, witness tampering and witness retaliation. See Statement of Material Facts (SMF) ¶ 1. Millbrook was committed to the Bureau of Prisons on September 14, 2007. Id. ¶ 2. Millbrook's projected release date is September 4, 2033, via good conduct time release. Id. ¶ 3.

### **2. Facts Regarding the Alleged Incident.**

On March 4, 2010, at approximately 4:45 a.m., Millbrook was involved in an altercation with his cell mate. Id. ¶ 5. Both inmates submitted to restraints and were removed from their cell. Id. ¶ 6. Millbrook and his cell mate were separated and placed in holding areas pending injury assessment and photographs. Id. ¶ 7. Later that morning, an unrelated mass search of the housing unit occurred. Id. ¶ 8. The search was in no way related to Millbrook being placed in a holding cell. Id. ¶ 9. The next day, March 5, 2010, Millbrook made allegations of sexual assault against staff. Id. ¶ 10. The matter was investigated and was determined to be unsubstantiated. Id. ¶ 11.

## **IV. Questions Presented**

- I. Should the Court dismiss the Complaint because the Defendant is entitled to sovereign immunity?

- II. Alternatively, should the Court grant summary judgment in favor of Defendant because Millbrook's negligence claim fails?

Suggested Answers: in the affirmative.

## V. Argument

### I. Defendant is entitled to Sovereign Immunity.

#### A. Legal Standard.

When ruling on a Fed. R. Civ. P. 12(b)(1) motion, a court may treat the motion as a factual challenge, which does not require a court to accept the allegations of a complaint as true. See Gould Elecs. Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). The court may weigh any evidence to satisfy itself that it does or does not have subject matter jurisdiction, but it cannot consider the merits of an action until it is satisfied that the dispute falls within the class of cases or controversies to which Article III, Section 2 of the United States Constitution has extended the judicial power of the United States. See Steel City Co. v. Citizens For Better Environment, 523 U.S. 83, 102 (1998). A plaintiff bears the burden of establishing that the district court has subject matter jurisdiction over the claims raised in the complaint. See Packard v. Provident Nat'l Bank, 994 F. 2d 1039, 1045 (3d Cir. 1993). A court that is without proper jurisdiction cannot proceed at all and must dismiss the suit. See Arizonans For Official English v. Arizona, 520 U.S. 43 (1997).

- B. Millbrook's Complaint should be dismissed because the United States is not liable for any claims arising out of intentional torts committed by federal employees within the scope of their employment.

To the extent that the FTCA claim is construed as alleging an intentional tort by Officer Peeler and two other officers, the United States is immune from suit. Specifically, "the United States is not liable for any claims arising out of assault and/or battery committed by federal employees within the scope of their employment unless the employee was a law enforcement officer." McKinney v. United States of America, 2005 WL 2335318 at \*3 (M.D. Pa. Sep. 23, 2005) (McClure, J.) (citing 28 U.S.C. § 2680(h)) (copy attached). There is no dispute that a correctional officers are law enforcement officers; however, since the incident Millbrook alleges did not occur during the course of an arrest, search, or seizure, his FTCA claim is precluded. See Pooler v. United States, 787 F.2d 868, 872 (3d Cir. 1986); McKinney, 2005 WL 2335318 at \*4.

In Pooler, the Third Circuit addressed an FTCA claim regarding a Veterans Administration ("VA") police officer. In addressing the intentional tort exception in the FTCA, the Court noted that a investigative or law enforcement officer is defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." Pooler, 787 F.2d at 872 (quoting 28 U.S.C. § 2680(h)). There, the Court dismissed the claim, stating that the plaintiff did not allege the VA officer had "committed an intentional tort while executing a search, seizing evidence, or making an arrest." Id. Later, in McKinney, the Middle District of Pennsylvania stated that "Pooler's determination that the intentional tort exception of § 2680(h) is limited to specific kinds of law enforcement activity is binding precedent on this Court." McKinney, 2005 WL 2335318 at \*4.

In this case, Millbrook alleges unconstitutional conduct by Officer Peeler occurred while Millbrook was in a



holding cell after having an altercation with his cellmate. See Doc. 1, Compl. It did not occur during the course of an arrest, search, or seizure. While there may be an issue of whether Millbrook has been "seized" in that he is currently in the custody of the BOP, the Third Circuit has indicated that a "seizure" for purposes of § 2680(h) refers only to the seizure of evidence. See Pooler, 787 F.3d at 872; McKinney, 2005 WL 2335318 at \*4.

Therefore, since Officer Peeler was acting within the scope of his employment when the alleged assault occurred, and the incident did not involve an arrest, search, or seizure, the United States is immune from suit and the Complaint should be dismissed.

**II. The undisputed record establishes that Millbrook's negligence claim is without merit and Defendant is entitled to judgment as a matter of law.**

**A. Legal Standard**

Summary judgment is appropriate when supporting materials, such as affidavits and other documentation, show there are no material issues of fact to be resolved and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In Celotex, the Court held that "Rule 56(e)\* \* \* requires that the non-moving party go beyond the pleadings by [his] own affidavits, or by 'depositions, answers to interrogatories and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting Fed. R. Civ. P. 56). Additionally, an opposing party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex, 477 U.S. at 325.

## B. Millbrook's Negligence Claim Fails.

In the event the Court determines the Defendant is not entitled to sovereign immunity, which Defendant disputes, summary judgment should be entered in favor of Defendant because Millbrook's negligence claim fails.

The Federal Tort Claims Act governs all claims against the United States for money damages, for injury or loss of personal property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. 28 U.S.C. § 2675(a). Further, under the FTCA, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for \* \* \* punitive damages." 28 U.S.C. § 2674. The FTCA "provides a mechanism for bringing a State law tort action against the Federal Government in Federal Court" and the "extent of the United States' liability under the FTCA is generally determined by reference to state law." In re Orthopedic Bone Screw Product Liability Litigation, 264 F.3d 344, 362 (3d Cir. 2001) (quoting Molzof v. United States, 502 U.S. 301, 305 (1992)).

It is well-settled that a federal district court in considering a FTCA action must apply the law of the state, in this case Pennsylvania, in which the alleged tortious conduct occurred. 28 U.S.C. § 1346(b)(1991); Turner v. Miller, 679 F. Supp. 441, 443 (M.D. Pa. 1987). To establish a cause of action for negligence, a plaintiff must prove the following elements: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages. Pittsburgh Nat'l Bank v. Perr, 637 A.2d 334, 336 (Pa. Super. Ct. 1994).



Millbrook's negligence claim fails for a number of reasons. First, Millbrook alleges that he was "sexually assaulted and battered maliciously with evil intent." See Doc. 1, Compl. p. 5. If we accept these allegations as true, then his negligence claim fails because as set forth above, 28 U.S.C. § 2680 bans any claims arising out of assault and battery.

Second, other than his bald assertions that he was sexually assaulted and battered maliciously with evil intent, he offers no proof of the same, and a thorough investigation into his allegations failed to reveal any evidence to substantiate his claims. On March 5, 2010, Millbrook was interviewed by SIS Lieutenant J. Fosnot regarding allegation of sexual assault by three staff members the preceding day. Millbrook's statement was reduced to an affidavit. See Declaration of Michael S. Romano (Ex. A); Attach D, OIG Investigations w/ attachments pp. 8-9 (submitted in camera). The matter was investigated by the Office of Inspector General (OIG). Id. Numerous staff were interviewed regarding the allegations. Id.; Staff Affidavits (Attach. B & C) (submitted in camera.) Further, medical and psychology records were reviewed. Id.; Attach D, OIG Investigations w/ attachments pp. 8-9 (submitted in camera). The investigation by OIG determined the allegations were unsubstantiated. Id. p. 1.

Further, Correctional Officer Peeler denies having any dealings with Millbrook on the day of the shake-down. Id.; Attach. B, Peeler Affidavit. Also, Millbrook told investigators that inmate Weber witnessed the assault. Id. Attach D, OIG Investigations w/ attachments p. 5 (submitted in camera). When the investigator interviewed Weber, he denied seeing Peeler or any other BOP employee assault Millbrook. Id.

Moreover, Millbrook claims that he was choked to such a degree that he nearly passed out, however, when he was evaluated and examined by Dr. Pigos, there were no signs of injury to his neck. Id.; Attach D, OIG Investigations w/ attachments pp. 8-9 (submitted in camera). Finally, and significantly, psychology records indicated Millbrook made similar allegations while incarcerated at FCC Terre Haute. Id. p. 17-19. In light of the foregoing, Millbrook's negligence claim fails and the United States is entitled to judgment as a matter of law.

#### VI. Conclusion

For the reasons noted above, Defendants respectfully request that the Court grant their motion to dismiss or, in the alternative for summary judgment.

Respectfully submitted,

PETER J. SMITH

United States Attorney

s/ G. Michael Thiel

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Date: April 12, 2011

UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

KIM MILLBROOK

Plaintiff

[file stamp]

v.

Case No. 3:11-cv-131

UNITED STATES OF  
AMERICA

Defendant.

(Nealon, J.)

PLAINTIFF OPPOSITION TO DEFENDANT BRIEF  
IN SUPPORT OF MOTION TO DISMISS OR, IN  
ALTERNATIVE, MOTION FOR SUMMARY  
JUDGMENT

---

1) STATEMENT OF THE CASE:

This is a Federal Tort claim 28 U.S.C. § 1346(b) ("FTCA"), 28 U.S.C. § 2671, et. Seq. filed by Plaintiff Kim Millbrook #13700-026, a federal prisoner at Lewisburg U.S.P. Facility, seeking damages for compensatory damages and injunctive relief, intentional infliction of emotional distress and negligent infliction of emotional distress, based on the claims of negligence, and sexual assault and battery committed by Government employees while acting within the scope of his office or employment at Lewisburg U.S.P. These federal employees, who owed Plaintiff a duty of care, breached this duty by their negligence in failing to exercise reasonable care to protect Plaintiff. Defendants have filed a Brief in Support of Motion to Dismiss or, in Alternative, Motion for Summary Judgment as to Plaintiff negligence and intentional tort against Defendants, arguing that their conduct did not violate the Federal Tort Claim Act.

## STATEMENT OF Facts:

The Plaintiffs Declaration submitted in response to Defendant Brief in Support of Motion to Dismiss or, in Alternative, Motion for Summary Judgment, "disputes" their denial of Plaintiff's allegations in Complaint.

On March 4<sup>th</sup> 2010 at 4:45 am Plaintiff was attacked by his cellmate which lead to Plaintiff and cellmate being removed from the cell and taken to separate holding in the showing area, while in shower holding cell a Officer Peeler came in and began talking hostile to Plaintiff making verbal threats saying that "you are in Lewisburg prison now where you will be taught a lesson for giving staff problems. Staff member Peeler left the shower area but came back and told me to turn around and place my hands behind my back which I did. Peeler then placed hand restraints on me and then he removed me from the shower area and began to force me down stairs in the basement of G-Block in Lewisburg U.S.P.

Once down in the basement Plaintiff was then forced inside of a holding cell by officer Peeler, Peeler then took my hand restraints off and left but he "Peeler" came back with two other staff members by the name of Edinger and Gimberling. Staff member Edinger was the one who came to the holding cell and told me to turn around and cuff up which I did, once the cuffs were on I was pulled out by Edinger. I was made to back out of the cell. Edinger then grabbed me around my neck and forced me to the ground by choking me, I was made to kneel before Peeler whom began to pull his penis out of his pants and placed his penis in my mouth and told me to suck his dick, which I did out of fear for my life. Edinger at the time had loosened his grip around my neck, I begged them to stop but they did not. I Plaintiff noticed that staff member Gimberling was posted at the door but he did nothing

or said anything to stop Edinger or Peeler from sexually assaulting me. After they had finished Plaintiff was then placed back inside the cell by Edinger. The hand restraints were taken off by Edinger, and that's when Edinger said "Oh yeah by the way we know who you are, you came from Terre Haut, you are a snitch and a drop out and if you tell anyone about what we did we will kill you, then they left. By the time Plaintiff began to calm down from this horrible experience the PA Navarro came down into the basement and brought me my medication that Plaintiff takes everyday. Plaintiff then told PA Navarro that staff had assaulted and that they were trying to kill me. P.A. Navarro told me to be quiet by placing his finger up to his lips. Navarro then gave me my meds and left. A little time later Peeler, Edinger, and Gimberling came back with another inmate and placed him inside the cell next to me the Plaintiff. They began to assault him by beating on the inmate. That's when Plaintiff asked the staff member's why they were doing this to us, that's when Peeler said shut up Millbrook, before I make you such my dick again. After that they left me and the other inmate downstairs in the holding cells but they came back and took the inmate out and left me downstairs in holding cell. Later on another staff member came and took me out of the cell and put me in a cell back on G-Block, that's when the next day on March 5<sup>th</sup> 2010 I Plaintiff reported the sexual assault to the morning PA who was passing out medication. I Plaintiff was then taken out of cell and taken to health care where I was interviewed by Captain Trate and Perrin and other staff officials. I told them what happened to me by staff members Peeler, Edinger, and Gimberling, that they "Edinger" and Peeler sexually assaulted me and Gimberling stood by the door and did nothing to interfere with the attack. Also Plaintiff told Captain Trate that PA Navarro was told by Plaintiff that staff were trying to kill me, and had assaulted Plaintiff.



Plaintiff was never examined and given a physical examine by medical staff.

Plaintiff was then taken to talk to Lieutenant Fosnot and Psychology Turner and Perrin. I Plaintiff told them what happened to me Plaintiff by staff officials Peeler, Edinger, and Gimberling on March 4<sup>th</sup> 2010 by being sexually assaulted. Plaintiff gave a statement and told Lt. Fosnot that I would take a lie detector test and testify in court on the assault. Plaintiff also told Fosnot my life was in danger and needed to be removed from Lewisburg SMU due to being raped by the staff officials and being attacked by two inmates thus far. Plaintiff also told Lt. Fosnot he feared for his safety by staying in Lewisburg due to staff making threats saying if I told anyone they would kill me. Lt. Fosnot ignored my pleas and had me placed back in another cell on D-Block with another cell mate who attacked me a couple days later. Plaintiff was then seen by OIG and Plaintiff told them what happened about the sexual assault and that the inmate Weber heard Peeler tell me to shut up or he would make Plaintiff suck his dick again if I said anything else.

The defendants affidavits tell another story. They claim Peeler never had any dealings with me on the day of shake down, OIG claim that inmate Weber said he never seen staff employees or Peeler assault Plaintiff, Dr. Pigos said he examined my neck after the alleged incident, numerous staff were interviewed, and OIG investigation did not come up with anything to prove my allegations.

#### Question Presented:

1) Should the court dismiss the Complaint because Defendants are not entitled to sovereign immunity?

2) Should the court grant summary judgment in favor of Plaintiff because Plaintiff's intentional and negligent claim succeeds?

Suggested Answer: in the Affirmative.

### Argument

1) Standard For Deciding A Rule 12(b)(1) Motion to Dismiss:

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction raises the issue whether the court has the power to hear the matter before it. *Mortensen v. First Fed. Sav. And Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). The burden of establishing jurisdiction lies with the party seeking to invoke the courts jurisdiction. *Kehl Packages Inc. v. Fidelcor Inc.*, 926 F.2d 1406, 1406 (3d Cir. 1991); *Mortensen*, 549 F.2d at 891.

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may facially or factually challenge to court's jurisdiction. *Mortensen*, 549 F.2d at 891; *Gould Electronics, Inc. v. U.S.*, 220 F.3d 169, 176 (3d Cir. 2000) (citing *Mortensen*, 549 F.2d at 891). In reviewing a facial attack, a court considers the allegations of the complaint and documents referenced therein and attacked thereto in light most favorable to Plaintiff. See *Gould*, 220 F.3d at 176; *PBGC v. White*, 998 F.2d 1192, 1196 (3d Cir. 1993). In reviewing a facial attack, the court may consider evidence outside the pleadings, including affidavits. See *Gotha v. U.S.*, 115 F.3d 176, 178-79, 36 V.I. 362 (3d Cir. 1997). When a court's power to hear a case is at issue, a court is free to weigh the evidence regarding jurisdiction. *Mortensen*, 549 F.3d at 891-92. The motion to dismiss presents a factual attack on the courts jurisdiction based upon the statute of limitations under the F.T.C.A. The court will consider all pleadings and exhibits submitted by the parties relating to subject matter jurisdiction.



2) Defendants are not entitled to sovereign immunity:

The F.T.C.A. provides a remedy in damages for simple negligence of employees of United States v. Muniz, 344 U.S. 150, 150, 83 S. Ct. 1850, 10 L. Ed. 2d 805 (1963). Under the F.T.C.A., sovereign immunity is waived against persons suing the federal government for commission of various torts. Simon v. United States, 341 F.3d 193, 200 (3d Cir. 2003). In presenting an F.T.C.A. claim, Plaintiff must show (1) that a duty was owed to him by a defendant; (2) a negligent breach of said duty; and (3) that the negligent breach was proximate cause of Plaintiff's injury loss. Mahler v. United States, 196 F. Supp. 362, 364 (W.D. Pa. 1961), aff'd 306 F.2d 713 (3d Cir.), cert. denied, 371 U.S. 923, 83 S. Ct. 290, 9 L. Ed. 2d 231 (1962). The United States is only liable under the F.T.C.A. for conduct by government employees while acting within their scope of employment. Matsko v. United States, 372 F.3d 556, 559 (3d Cir. 2004). When determining if the defendant was acting within the scope of his employment look to the law of the state where the incident occurred. Doughty v. United States Postal Service, 359 F. Supp. 2d 361, 365 (N.J. 2005).

3) Plaintiff has a viable claim pursuant to the FTCA:

Some years ago the Supreme Court held that liberty from bodily restraint always has been recognized as the core of protected by Due Process Clause from arbitrary government action. The Supreme itself describes restraints as a form of use of force in *Muhler v. Mena*, 544 U.S. 93, 99, 125 S. Ct. 1465 (2005). Here it is evident that the Defendants restrained Plaintiff while choking and committing and intentional tort of sexual assault and battery. Plaintiff was in an unauthorized area, at all times Plaintiff was also in hand restraints, and was unable to

resist or defend himself from this brutal attack by government officials acting within the scope of their employment. See Pl. Declaration pages 6–7. Also see (Exhibit “PL” 1–17).

F.T.C.A. sexual assault and battery and sexual abuse may constitute the torts of assault and battery or intentional infliction of emotional distress. *K.M. v. Alabama Dept of Youth Service*, 350 F. Supp. 2d 1253 (M.D. Ala. 2005) (state battery law requires a rude or angry touching, and indecency is a kind of rudeness); *Bolton v. U.S.*, 347 F. Supp. 2d 1218, 1222–213 (N.D. Fla. 2004) (allowing sexual battery claim to go forward; putting fingers into prisoner’s vagina would constitute assault and battery). But see *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir. 2004). (Also known as outrage,) consent is likely to be relevant to an assault and battery since you must generally show an unpermitted contact to prove the tort. See *Giron v. Corrections Corp. of America*, 191 F.3d 1281, 1288 (10 Cir. 1999). Or it may support a claim of negligence by supervisors, *White v. Ottinger*, 442 F. Supp. 2d 236, 251 (E.D. Pa. 2006) (coerced anal sex supported claim for intentional infliction of emotional distress and negligent infliction of emotional distress, any of which may be actionable under the F.T.C.A.” as well as directly under state law. *Bolton v. U.S.* 347 F. Supp. 2d 1218, 1221–22 (N.D. Fla. 2004). See Plaintiff’s Doc. 1, Compl. p. 5.

To establish a negligence claim Plaintiff must prove the following elements (1) that a duty was owed to Plaintiff by Defendant; (2) a neglect breach of said duty; and (3) that the negligent breach was proximate cause of Plaintiff’s injury or loss. *Mahler v. United States*, 196 F. Supp. 362, 364 (W.D. Pa. 1961), *aff’d* 306 F.2d 713 (3d Cir.), *cert. denied*, 371 U.S. 923, 83 S. Ct. 290, 9 L. Ed. 2d 231 (1962). Due to staff official Gimberling negligent actions, the Gimberling owed me a duty of care to protect

Plaintiff from the sexual assault and battery of staff members Peeler and Edinger. See 18 U.S.C. § 4042; see also 474 F. Supp. 2d 829 Davis v. United States February 16, 2007. When government employee's negligence allows another government employee to commit an intentional tort, the courts have found liability not for intentional tort, but for negligence that precipitated the intentional tort. See Plaintiff Declaration page 7.

Due to the intentional tort of sexual assault and batter by federal employees "Peeler" on Plaintiff while forced downstairs into the basement at Lewisburg USP March 4<sup>th</sup> 2010, Plaintiff was seized by Government officials. Because it is noted that the most, the most common type of seizure is an arrest which results in detention, "however," an investigative stop that momentarily detains a person has been held to be a seizure. See Terry v. Ohio, 392 U.S. 188 S. Ct. 1868, 20 L. Ed. 889 (1968). The FTCA recognizes Federal employees under 2680(h) while acting in the scope of their employment to commit an intentional tort it has to be in the course of an arrest, search, and "seizure"; see Pooler v. United States, 787 U.S. 868, 872 (3d Cir. 1986). This case "Pooler" does not apply to Millbrook's pending sexual assault and battery intentional tort claim because Plaintiff was seized by employees at all times forced downstairs in unauthorized area, in restraints, detained, forced to commit a sexual act due to threats on Plaintiff health and safety. See also Gallo v. City of Philadelphia, 161 F.3d 217, 223 (3d Cir. 1998). The Third Circuit recognized that the Supreme Court decisions provided that "seizure" is a show of "authority" that "restrains" and detains the liberty of a "citizen." It also added that an intentional limitation of liberty constitutes a "seizure." So therefore Millbrook's intentional and negligent claims should survive. See Plaintiffs Exhibits A, B,

C, for materials facts; see also Plaintiff Declaration pages 6-7.

4) Conclusion,

For the reasons noted above Plaintiff respectfully request that the court's dismisses Defendant motion to Dismiss or, in the Alternative for Summary Judgment and let Plaintiff's intentional and negligent tort claim proceed.

Date:

Kim Millbrook

Respectfully submitted

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KIM MILLBROOK

[file stamp]

Plaintiff

v.

Civil No. 3:11-cv-131

UNITED STATES OF  
AMERICA

(Nealon, J.)

Defendant.

DECLARATION IN OPPOSITION TO  
DEFENDANTS MOTION TO DISMISS, OR IN  
ALTERNATIVE, MOTION FOR SUMMARY  
JUDGMENT

I, Kim Millbrook, declare under penalty of perjury:

1.) I am the Plaintiff in the above entitled case. I make this Declaration in Opposition to Defendant Motion for Dismissal, or in Alternative, Motion for Summary Judgment, on Plaintiff claims concerning staff negligence, sexual assault and battery, negligent infliction of emotional distress, causing lifetime damages of post traumatic stress dis-order by the Defendants United States of America, for intentional and negligent acts of Bureau of Prison officials, namely: Officers Edinger, Peeler, and Gimberling, Plaintiff also ask for injunctive relief.

2.) The Defendants agents claim in their affidavits in summary that they denied the Plaintiff's allegations and OIG investigation determined the allegations were unsubstantiated, and when OIG questioned inmate Weber he denied seeing Plaintiff assaulted by any BOP employee or Peeler.



3.) The Defendant's agent Dr. Pigos stated that he examined Plaintiff neck area on day that Plaintiff made allegations of being choked by staff and Pigos seen no injury on around neck.

4.) The Defendant and its agent are not entitled to summary judgment because there are genuine issues of material to be resolved. These issues are identified in the accompanying Statement of Disputed Factual Issues filed by the Plaintiff pursuant to Rule 56.1 of Local Rules of this District Court. These facts are set out in this Declaration.

5.) On March 1<sup>st</sup> 2010 Plaintiff was brought to Lewisburg Special Management Unit from Terre Haute United States Penitentiary. Upon arrival Plaintiff was interviewed by Captain Trate and Special Investigative Assistant Perrin.

6.) Plaintiff told Captain Trate and SIA Perrin that he has enemies in Lewisburg due to threats and attacks on his life by known gang affiliated inmates and staff officials.

7.) Plaintiff told Captain Trate and SIA Perrin that he has been sexually assaulted by staff officials in Terre Haute U.S.P. and needed protective custody or single cell status.

8.) Plaintiff was then escorted to D-Block and forced into a cell with another inmate who told staff officials he would kill me if they placed Plaintiff inside the cell.

9.) Staff officials Spade, Lt. Jordan, and other unknown staff officials took the inmate out of the cell and then forced me into the cell and then brought the violent inmate back who threatened to kill Plaintiff and put inmate back inside cell with Plaintiff.

10.) Plaintiff was attached by inmate all while Plaintiff was still in hand restraints.

11.) Plaintiff was punched several times in the head and facial are and received numerous cuts and bruises and had to be viewed by health care personnel.

12.) Plaintiff was then taken from cell to the health care and from health care to G-Block.

13.) Plaintiff was then taken to another cell on G-Block and there another inmate was told by the staff officials to take me into his cell.

14.) Plaintiff beg the inmate not to beat me up due to me being attacked by another inmate earlier.

15.) Plaintiff told staff to not force Plaintiff into the cell due to Plaintiff eye being swollen from being struck by the other inmate on D-Block.

16.) Plaintiff was forced inside the cell with the inmate after he told the staff he did not want me inside his cell, and if forced he would attack me and beat me up.

17.) Staff officials opened the door to the cell and told me to go inside or they would beat me up.

18.) Plaintiff went into the cell and stay inside the cell for 3 days telling staff to move him due to the inmate making threats he would kill Plaintiff if he did not leave the cell.

19.) On March 4<sup>th</sup> 2010 4:45 am me and the inmate were taken out of the cell due to Plaintiff being attacked for a second time by inmate and Plaintiff had to defend himself.

20.) Plaintiff was taken to the shower area on G-Block 1<sup>st</sup> Floor and placed inside the shower until medical staff and Lieutenant came to assess Plaintiff.



21.) Plaintiff to the Lieutenant on the shift that my life was in danger and I was being forced inside cells with hostile inmates at Lewisburg SMU Program.

22.) The shift officers for morning watch came on and that's when staff official Peeler came into the shower area.

23.) Peeler began getting hostile with Plaintiff saying he was tired of my fucking crying because I told him and other staff that my life and safety were in danger and to not put me back into another cell with cellmates who wanted to attach and hurt me.

24.) Peeler then left but came back and told Plaintiff to turn around so he could put hand restraints on Plaintiff.

25.) Plaintiff did what he was ordered by Peeler.

26.) Plaintiff was taken out of shower by Peeler and forced down into the basement area.

27.) Peeler told me that Plaintiff would learn that he was in Lewisburg Prison now.

28.) Plaintiff was forced into a cell down in basement and left there by Peeler for about an hour.

29.) Peeler came back with 2 other officers who were later identified by the names of Edinger and Gimberling.

30.) Staff official Edinger came to the cell and told me to turn around and let him put the hand restraints on Plaintiff.

31.) Plaintiff noticed staff official Gimberling posted up by the door as if guarding it.

32.) Edinger put on hand restraints and Plaintiff was made to back out of the cell.

33.) Staff officials Edinger and Peeler forced me to the ground on my knees and Edinger grabbed me around my neck and began to choke Plaintiff.

34.) Edinger hand his arm around my neck.

35.) Peeler stood in front of Plaintiff and began to unzip his pants and told plaintiff to suck his penis.

36.) Plaintiff feared for his life and did as I was force to do, giving Peeler oral sex.

37.) Edinger loosened his hold around my neck.

38.) After Plaintiff was done giving Peeler oral sex Plaintiff was put back inside the cell in basement.

39.) Edinger said "Yeah Millbrook we know who you are" you are a little drop out bitch from Terre Haute and a little snitch bitch.

40.) Peeler and Edinger to Plaintiff if he told any body what they did to Plaintiff they would kill Plaintiff, and then they left.

41.) About 30 minutes later PA Navarro came down into the basement to bring Plaintiff medication that Plaintiff takes every day for depression and high blood pressure.

42.) Plaintiff then to PA Navarro that Peeler Edinger and Gimberling assaulted him and they were trying to kill me.

43.) Navarro told Plaintiff he would take care of the situation and left but never came back.

44.) Later on Peeler, Edinger, and Gimberling brought another inmate down into the basement and began to beat on him inside the next cell.

45.) Peeler told me to "shut my mouth before he made me suck his dick again," due to me asking why they

were doing what they were doing to Plaintiff and the other inmate.

46.) The inmate name was Weber and heard Peeler say he would make Plaintiff suck his dick again if Plaintiff did not shut his mouth.

47.) Peeler and Edinger and Gimberling left but came back and removed the other inmate Weber and left Plaintiff down in basement.

48.) Plaintiff was finally moved out of basement around 4:00 PM and put back into a cell on G-Block.

49.) Next day March 5<sup>th</sup> 2010 reported the sexual assault to medical staff.

50.) Plaintiff was taken to medical by some staff officials and interviewed by the Captain Trate and SIA Perrin and other staff officials.

51.) Then Plaintiff was taken to be interviewed by Lieutenant Fosnot and Psychology and gave them a verbal statement about being raped by Peeler and assaulted by Edinger and Gimberling.

52.) Plaintiff told SIA Fosnot that Peeler and Edinger threatened to kill me if I told anyone and I needed protective custody, and to be removed from Lewisburg USP.

53.) I Plaintiff was taken from SIA office and forced into another hostile inmate cell on D-Block whom attacked Plaintiff 2 days later.

54.) On October 19, 2009 filed an Regional Appeal for Administrative Remedy Case No. 556488-R1, while at the Terre Haute Facility appealing response from Warden Marberry dated 10-14-09 in regards to being harassed and threatened by Captain Joyner making verbal threats to Plaintiff in front of Lt. Parker (SHU Lieutenant) stating "I think I'm a killer and when I'm transferred to

Lewisburg Prison I'll get what I deserve, that someone in Lewisburg will kill me for running your mouth. This being a clear of threats on my life. Captain Joyner should be fired. Captain Joyner verbal remarks could have lead up to staff officials at Lewisburg U.S.P. upon Plaintiff initial arrive, placing Plaintiff in cells with extremely violent inmates, and being sexually assaulted and battered by staff officials here at Lewisburg U.S.P. and sexually assaulted by a inmate here at Lewisburg U.S.P. and got response back from Regional Remedy Appeal Case No. 609203-31, dated November 12<sup>th</sup> 2010, due to staff negligence, incident date of occurrence 9-16-10, staff officials involved, AW Rear, staff members Hess and Ross, AW Rear witnessed sexual assault and did noting, also inmate Derrick Brown.

55.) On 10-29-09 Plaintiff filed a Central Office Administrative Remedy Appeal, Case No. 551092-F2 concerning Nurse Bixler, Nurse Scharff, and PA Ndire not reporting Plaintiff being sexually assaulted and physically assaulted y Special Housing Unit staff officials on 7-8-09, it took 4 to 5 days after Plaintiff reported the assaults to staff at health care before I was medically examined.

56.) On 4-29-10 Warden Bledsoe responded to my administrative remedy dated 4-19-10 claiming staff negligence for placing Plaintiff in a cell with a cellmate and letting the inmate assault Plaintiff while still in the hand restraints. Admin. Remedy No. 586680-F1.

57.) On 5-3-10 Plaintiff filed Regional Administrative Remedy, responding to Case No. 586723-R1 by J.L. Norwood concerning me Plaintiff being attacked by the cellmate on March 4<sup>th</sup> 2010 at Lewisburg U.S.P. Before Plaintiff was sexually assaulted and battered by staff on March 4<sup>th</sup>, 2010, staff forced Plaintiff into cell and had knowledge that Plaintiff did not want to be inside cell

with other inmate due to just being attacked by another inmate on March 1<sup>st</sup> 2010.

58.) On 8-26-10 Plaintiff received response back from Warden Bledsoe, Case No. 60-3622-F1, Admin. Remedy concerning being brutally attacked by another cellmate on July 24<sup>th</sup> 2010, this being the third attack by a hostile inmate and staff had been notified on each and every incident but they still where forcing Plaintiff to take these violent cell mats putting my life and safety in imminent danger.

Contrary to Defendants affidavits Plaintiff Declaration alone should provide substantial evidence of material facts to survive prima facie.

The foregoing allegations factually create a genuine issue of material facts and will entitle me to judgment as explained in Brief submitted with Declaration.

Pursuant to 28 U.S.C. § 1746 I declare under penalty of perjury the foregoing is true and correct.

Date: 4-17-11

by Kim Millbrook

**U.S. Department of Justice  
Federal Bureau of Prisons**

**Central Office  
Administrative  
Remedy Appeal**

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Millbrook, Kim L.

LAST NAME, FIRST NAME, MIDDLE INITIAL

13700-026

SMU

Terre Haute

REG. NO.

UNIT

INSTITUTION

**Part A - REASON FOR APPEAL**

This is a appeal in regards to Case No. 551092 F2 regarding Nurse Bixler, Nurse Scharff, and PA Ndire not responding me being sexually and physically assaulted by Special Housing Unit staff officials on 7-8-09. This needs to be investigated and the Nurse Bixler, Scharff and PA Ndire fired for their negligence.

10-29-09

Kim Millbrook

DATE

SIGNATURE OF REQUESTER

**Part B - RESPONSE**

[date stamp]

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: \_\_\_\_\_



**Administrative Remedy Number 551092-A1****Part B – Response**

This is in response to your Central Office Administrative Remedy Appeal in which you allege staff misconduct at USP Terre Haute. Specifically, you allege you were physically and sexually assaulted by staff in the Special Housing Unit on July 8, 2009. You further allege that staff failed to report this incident to the proper authorities. You request an investigation and that staff be fired for their negligence.

Staff conduct is governed by Bureau of Prisons' Program Statement 3420.09, Standards of Employee Conduct. The Bureau of Prisons takes allegations of staff misconduct seriously. Your allegations are being referred to the appropriate Bureau of Prisons' component for review. Staff personnel matters are not subject to inmate review.

This response is provided for informational purposes only.

February 19, 2010  
Date

for Delia A. Rios  
Harrell Watts, Administrator  
National Inmate Appeals



**MILLBROOK, KIM**

Reg. No. 13700-026

Appeal No. 586723-R1

Page One

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**Part B - Response**

You appeal the response from the Warden at USP Lewisburg regarding your claim that staff were negligent for placing you with a cell mate who attacked you on March 4, 2010. You claim this inmate told staff he did not want you in his cell. You seek to be removed from the Special Management Unit (SMU) program, this incident investigated and staff be reprimanded.

A review of your appeal revealed, on March 4, 2010, you were involved in a physical altercation with your cell mate and received an incident report for fighting. On May 14, 2010, you were found to have committed the prohibited act by the Discipline Hearing Officer. Records indicate you have chosen not to appeal this decision. In addition, USP Lewisburg considers safety and security issues when moving inmates and making cell/housing assignments. This office confirmed an inquiry was conducted and there were no known issues between you and this inmate. However, you should advise staff if there are issues with another inmate at USP Lewisburg so an assessment can be conducted. There is no evidence staff acted in an inappropriate manner and your removal from the SMU program is not warranted. Accordingly, your appeal is denied.

If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons. Your appeal must be received in the Administrative Remedy Section, Office of General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C.

20534, within 30 calendar days of the date of this response.

Date: June 14, 2010

/s/ \_\_\_\_\_  
J. L. NORWOOD  
Regional Director

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KIM MILLBROOK

Plaintiff

v.

Case No. 3:11-cv-131

UNITED STATES OF  
AMERICA

(Nealon, J.)

Defendant.

[file stamp]

PLAINTIFF STATEMENT OF DISPUTED  
FACTUAL ISSUES

Defendant have moved for Motion to Dismiss or, in Alternative, Motion for Summary Judgment on Plaintiff's claims of negligence and sexual assault and battery in a FTCA Tort Claim 28 U.S.C. § 1346(b), also 28 U.S.C. § 2671 et seq., pursuant to Rule 56(b), Rule 12(b), F.R.C.P., of this court. The Plaintiff submits the following list of genuine issues of material facts that require the denial of defendants motion.

1.) Whether the Defendants are entitled to sovereign immunity?

2.) Whether the Defendants committed the claims of negligent and intentional tort in Plaintiffs Federal Tort Claim?

3.) Whether the Defendants thoroughly investigated Plaintiffs Federal Tort Claim on the Regional level?

4.) Whether the Defendants committed a pattern of negligence as to Exhibits A, B, C of Plaintiff, health and safety in the Bureau of Prisons custody.

Date: 4-21-11

Kim Millbrook

Respectfully submitted

Kim Millbrook

#13700-026

PO Box 1000

Lewisburg, PA 17837

PJS:GMTjmh

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF  
PENNSYLVANIA**

|                       |   |                              |
|-----------------------|---|------------------------------|
| <b>KIM MILLBROOK,</b> | : | <b>CIVIL NO. 3:11-CV-131</b> |
| <b>Plaintiff</b>      | : |                              |
| <b>v.</b>             | : | <b>(Nealon, J.)</b>          |
| <b>UNITED STATES</b>  | : |                              |
| <b>OF AMERICA,</b>    | : |                              |
| <b>Defendant</b>      | : | <b>Filed Electronically</b>  |

**REPLY BRIEF IN SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
FOR SUMMARY JUDGMENT**

**I. Introduction**

Defendant, the United States of America, by and through its counsel, submit this reply brief in support of Defendant's Motion to Dismiss or, in the alternative, Motion for Summary Judgment. (Doc. No. 9). The Court should dismiss the Complaint because Defendant is entitled to sovereign immunity. Alternatively, the Court should enter summary judgment in favor of Defendant because Millbrook's negligence claim fails.

**II. Procedural History**

Millbrook, a federal prisoner incarcerated at the United States Penitentiary in Lewisburg, Pennsylvania ("USP Lewisburg"), filed an FTCA<sup>1</sup> complaint on Janu-

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<sup>1</sup> Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671 *et seq.*

ary 19, 2011, claiming that he was sexually assaulted by Bureau of Prison's Staff. On February 2, 2011, the Court issued an Order directing service of the Complaint and ordering Defendant to respond within 60 days.

Defendant filed a Motion to Dismiss or, in the alternative, Motion for Summary Judgment arguing Defendant is entitled to sovereign immunity and Millbrook's negligence claim fails. On April 25, 2011, Millbrook filed numerous documents including: a brief in opposition to Defendant's dispositive motion, a supporting declaration, a declaration as to exhibits, a counter-statement of facts, and a Motion for Summary Judgment.

In Millbrook's opposition documentation he reiterates a different variation of virtually the same allegations in his Complaint. In addition, Millbrook adds names of the other correctional officers he indicates were involved in the alleged incident. The majority of Millbrook's opposition brief is devoid of any argument. Millbrook states that in accordance with Terry v. Ohio, 392 U.S. 1 (1968), he was "seized" during the time he was "forced into the basement." (Doc. 20, p. 10.) Millbrook further argues that Pooler v. United States, 787 F.2d 868, 872 (3d Cir. 1986), does not apply to his "intentional tort claim because Plaintiff was seized by employees at all times." (*Id.* p. 11.) Millbrook also cites to several cases to substantiate the elements of negligence that he alleges were violated and lists several more cases as proof that a sexual assault is an "assault and battery." (*Id.* pp. 7, 9, 10.)

As for Millbrook's declaration, (Doc. 21), it consists of 58 consecutively numbered paragraphs, of which, the majority of his averments have no relevance to this case be-

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cause they concern his placement in cells with inmates that he did not get along with, complaints he raised regarding these cell mates, and altercations he had with cell mates. (Doc. 21, ¶¶ 5-19, 53-58.) Another large portion of the declaration directly set forth the same allegations as were in his Complaint. (*Id.* ¶¶ 20-40, 49-52.)

Millbrook's second declaration, (Doc. 22), contain copies of administrative remedies and two affidavits. The administrative remedies have nothing to do with the case at bar. Rather, Millbrook appears to attach a series of remedies filed and responses received regarding violent cell mates, altercations with cell mates, and an alleged sexual assault by a cell mate. (*Id.*) The affidavits he attaches are also completely irrelevant to this action as they both involve alleged excessive use of force by staff allegations. (*Id.*) Finally, Millbrook's "Statement of Disputed Facts" merely states four questions presented which all relate to questions of law, rather than factual contentions. (Doc. 23.)

### III. Argument

To the extent Millbrook is attempting to argue against Defendant's contention that the FTCA claim is construed as alleging an intentional tort by Officer Peeler and two other officers that the United States is immune from suit, by relying on Terry v. Ohio and a contention that Pooler is inapplicable to him, Millbrook's argument lacks merit. As set forth in more detail in Defendant's principle brief, "the United States is not liable for any claims arising out of assault and/or battery committed by federal employees within the scope of their employment unless the employee was a law enforcement officer." McKinney v. United States of America, 2005 WL 2335318 at \*3 (M.D. Pa. Sep. 23, 2005) (McClure, J.) (citing 28 U.S.C. § 2680(h)). There is no dispute that a correctional



officers are law enforcement officers; however, since the incident Millbrook alleges did not occur during the course of an arrest, search, or seizure, his FTCA claim is precluded. See Pooler v. United States, 787 F.2d 868, 872 (3d Cir. 1986); McKinney, 2005 WL 2335318 at \*4. Further, "Pooler's determination that the intentional tort exception of § 2680(h) is limited to specific kinds of law enforcement activity is binding precedent on this Court." Id.

Millbrook cites to Terry to bolster his argument that he was "seized," but Terry refers to the definition of a seizure in a temporary detention situation like that of a traffic stop rather than an inmate incarcerated and being transported by correctional officers in the facility. Therefore, since Officer Peeler was acting within the scope of his employment when the alleged assault occurred, and the incident did not involve an arrest, search, or seizure, the United States is immune from suit and the Complaint should be dismissed.

Additionally, Millbrook's new claims of excessive force by staff are not properly before the Court. In considering a motion to dismiss, "the district court is limited to facts alleged in the complaint, not those raised for the first time by counsel in its legal memorandum." Town of Secaucus v. United States Dep't of Transp., 889 F. Supp. 779, 791 (D.N.J. 1995). Further, it is well-settled that a plaintiff may not amend the complaint through statements contained in a brief filed in opposition to a motion to dismiss. Commonwealth of Pa. v. PepsiCo, Inc., 836 F.2d 173, 181 (3d Cir. 1988). Accordingly, any new allegations of excessive force are not properly before the Court.

Moreover, Millbrook merely reasserts unsupported factual allegations that he previously stated in his Complaint. (Doc. 20). Millbrook should not be permitted to re-

ly upon self-serving allegations in light of his failure to produce proper summary judgment evidence to oppose Defendant's Motion of Summary Judgment.

In opposing a motion for summary judgment, a party must adduce more than a mere scintilla of evidence in its favor and cannot simply reassert factually unsupported allegations contained in its pleadings. Celotex v. Catrett, 477 U.S. 317 (1986). Summary judgment is appropriate when supporting materials show there are no material issues of fact to be resolved and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

Federal Rule of Civil Procedure 56(e) provides that:

an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

Rule 56 requires the non-moving party to go beyond the pleadings and designate facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324. An issue is genuine only if the evidence is such that a reasonable trier of fact could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987). If evidence is merely colorable or not significantly probative, summary judgment must be granted. Anderson, 477 U.S. at 250; Hankins, 829 F.2d at 440. Where the record, taken as a whole, would not lead one to find for the non-moving party, summary judgment must be entered in favor of the movants. Id.

In addition, Millbrook failed to properly respond to the Defendant's Statement of Material Facts (SMF) as required by M.D. Pa. L.R. 56.1. The local rules of this Court provide that a "separate, short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried" shall be filed in support of a motion for summary judgment brought pursuant to Fed. R. Civ. P. 56. M.D. Pa. L.R. 56.1. Defendant complied with this rule by filing its SMF (Doc. 17), which included a statement informing Millbrook that he needs to file a response to the statement in accordance with the local rules or the facts would be deemed admitted.

The local rules regarding summary judgment motions further provide that, "[t]he papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts, responding to the numbered paragraphs set forth in the statement required" of the moving party. Id. Furthermore, the parties' statements of material facts must include references to the parts of the record that support the statements. Id. Finally, M.D. Pa. L.R. 56.1 provides, "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." Id. Because Millbrook did not file the requisite response but merely posed four questions of law as his counter-statement of facts, the facts stated in Defendant's SMF should be admitted. See Ebersole v. Pennsylvania Dep't. of Corrections, 2009 WL 1010521 at \*2, fn1 (M.D. Pa. 2009)(Jones, J.)(relying upon M.D. Pa. L.R. 56.1, the Court admitted the facts stated in the defendant's statement of material facts because plaintiff failed to provide a requisite response).

#### IV. Conclusion

For the reasons noted above, Defendant respectfully requests that the Court grant its motion to dismiss or, in the alternative, for summary judgment.

Respectfully submitted,

PETER J. SMITH

United States Attorney

s/ G. Michael Thiel

G. MICHAEL THIEL

Assistant U.S. Attorney

PA 72926

JOANNE M. HOFFMAN

Paralegal Specialist

U.S. Attorney's Office

228 Walnut Street, 2nd Floor

P.O. Box 11754

Harrisburg, PA 17108

Phone: 717-221-4482

Fax: 717-221-2246

Date: April 27, 2011

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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No. 3:11-cv-00131-WJN-JVW

KIM MILLBROOK, PLAINTIFF

*v.*

UNITED STATES OF AMERICA, DEFENDANT

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February 16, 2012

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Kim Millbrook, Lewisburg, PA, pro se.

G. Thiel, U.S. Attorney's Office, Scranton, PA, for  
Defendant.

**MEMORANDUM**

WILLIAM J. NEALON, District Judge.

**Background**

This action pursuant to the Federal Tort Claims Act (FTCA) was initiated by Kim Millbrook, an inmate presently confined at the United States Penitentiary, Lewisburg, Pennsylvania (USP-Lewisburg). Named as sole Defendant is the United States of America. Service of the Complaint was previously ordered.

According to the Complaint, Plaintiff was housed in the USP-Lewisburg Special Management Unit (SMU) on or about March 5, 2010. On said date, Plaintiff alleges that he was taken to the basement of the SMU housing unit and "forced to perform oral sex on a Correctional Officer Pealer while Correctional Officer Edinger held me



around my neck in a choke hold., another Correctional Officer Gimberling stood watch by the door.” (Doc. 1, ¶ IV). Plaintiff adds that those officers also verbally threatened him with further injury in an effort to dissuade him from reporting the incident. Millbrook seeks relief under the FTCA on the basis that Officers Pealer, Edinger and Gimberling, while acting within the scope of their employment, subjected him to sexual assault and battery.<sup>1</sup>

Millbrook also states that he was sexually assaulted by prison staff while previously confined at USP–Terre Haute. Since the only tortious conduct asserted in the Complaint relates to the March 5, 2010 USP–Lewisburg incident those additional allegations will not be considered.

Defendant has responded to the Complaint by filing a motion to dismiss or, in the alternative, for summary judgment. *See* (Doc. 9). According to the Defendant, Inmate Millbrook was involved in an altercation with his cell mate on the morning of March 4, 2010. As a result, both prisoners were placed in restraints and removed from their cell. The combatants were transferred to separate holding pending injury assessment and photographs. The next day Millbrook asserted that he had been sexually assaulted by correctional staff. Following an internal investigation, which included a medical assessment, Plaintiff’s claim was found to be unsubstantiated. *See* (Doc. 18, p. 4).

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<sup>1</sup> A declaration by Plaintiff which accompanies his Complaint indicates that following the alleged incident of March 5, 2010, he was subjected to additional sexual assaults by both correctional staff and another prisoner.

In addition to submitting a brief in opposition to said motion, Plaintiff has also filed a cross motion for summary judgment. *See* (Doc. 24). The cross motions for summary judgment are ripe for disposition.

## **Discussion**

### **Motion to Dismiss**

Defendant's pending dispositive motion is supported by evidentiary materials outside the pleadings. Federal Rule of Civil Procedure 12(d) provides in part as follows:

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given reasonable opportunity to present all the material that is pertinent to the motion. FED. R. CIV. P. 12(b) (d). The Court will not exclude the evidentiary materials accompanying the Defendant's motion. Thus, the motion will be treated as solely seeking summary judgment.

### **Standard of Review**

Summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Saldana v. Kmart Corp.*, 260 F.3d 228, 231–32 (3d Cir. 2001). A factual dispute is "material" if it might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis that would allow a reasonable fact-finder to return a verdict for the non-



incident occurred. *Doughty v. United States Postal Service*, 359 F. Supp. 2d 361, 365 (D.N.J. 2005).

However, the United States is immune from certain intentional torts committed by its agents. For instance, the United States is not liable for claims arising out of assault and/or battery committed by federal employees within the scope of their employment unless the employee was an investigative or law enforcement officer. See 28 U.S.C. § 2680(h), p. 8; *McKinney v. United States*, 2005 WL 2335318, \*3 (M.D. Pa. 2005) (McClure, J.) (concluding that “the United States is not liable for claims arising out of assault and/or battery committed by federal employees within the scope of their employment unless the employee was an investigative law enforcement officer”). In the present matter, Defendant does not dispute that correctional officers may be deemed law enforcement officers for purposes of the FTCA.<sup>2</sup>

Rather, Defendant contends that Millbrook’s FTCA claim is precluded by the Third Circuit Court of Appeals’ interpretation of § 2680(h) in *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986). In *Pooler*, the Court of Appeals held that § 2680(h) waives the government’s sovereign immunity only in those cases in which a law enforcement or investigative officer commits one of the enumerated intentional torts “while executing a search, seizing evidence, or making an arrest.” *Id.* The Court explained that based on the underlying legislative history that the investigative officer exception should only apply

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<sup>2</sup> Moreover, it has been recognized within this district that BOP staff members may be considered law enforcement officers. See *King v. United States*, Civil No. 93-258, slip op. at 2 (M.D. Pa. July 27, 1993) (Kosik, J.); *Zakaria v. Bureau of Prisons*, Civil No. 95-1787, slip op. at pp. 7-9 (M.D. Pa. April 29, 1998) (McClure, J.).

to conduct taken by investigative or law enforcement officers during the course of a search, seizure, or an arrest.<sup>3</sup> *Id.* at 872.

In *Matsko*, the Third Circuit Court of Appeals recognized that *Pooler* set forth a narrow reading of § 2680(h), but declined to undertake a determination as to whether *Pooler* should be broadened to encompass all activities undertaken by investigative officers. *Matsko*, 372 F.3d at 560. *Pooler* remains binding precedent on this Court.

Under *Pooler*, in order to be actionable under the FTCA, the alleged misconduct had to occur during an arrest, search, or seizure. In the present case, the alleged unconstitutional conduct of March 5, 2010 did not occur during the course of an arrest. Second, the challenged actions were not undertaken during the course of a search. The third enumerated activity set forth in *Pooler* was seizure.

The most common type of seizure is an arrest which results in detention. Plaintiff contends that based upon the principles announced in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (holding that an investigative stop that momentarily detains a person is a seizure), and similar cases, the purported sexual assault occurred during a seizure because he was placed in restraints and taken to the basement of the SMU.<sup>4</sup> In *Gallo*

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<sup>3</sup> This Court recognizes that other courts not bound by the *Pooler* holding have adopted a broader view. See *Oritz v. Pearson*, 88 F. Supp. 2d 151, 164–65 (S.D.N.Y. 2000).

<sup>4</sup> A declaration (Doc. 21) submitted by Plaintiff in opposition to the request for summary judgment raises various new claims against USP–Lewisburg officials including assertions that he was improperly denied single cell status and was not protected from being assault-

*v. City of Philadelphia*, 161 F.3d 217, 223 (3d Cir. 1998), the Third Circuit Court of Appeals recognized that “Supreme Court decisions provide that a seizure is a show of authority that restrains the liberty of a citizen.” It added that an intentional limitation of liberty constitutes a seizure. *See id.* at 225.

Based on Millbrook’s allegations it would appear that there is a genuine issue as to whether the placement of Plaintiff in handcuffs and his being escorted to the basement of the SMU constituted a seizure. However, in *Pooler*, the Third Circuit Court of Appeals clearly indicated that seizure for purposes of § 2680(h) refers only to the seizure of evidence. *Pooler*, 787 F.3d at 872. In the present case, there are no facts alleged which could support a determination that the alleged conduct of March 5, 2010, occurred during a seizure of evidence as contemplated by *Pooler*.

Thus, although the purported conduct in the present case is troubling, it did not take place during an arrest, search, or seizure of evidence. Therefore, Plaintiff cannot obtain relief under the FTCA. *See McKinney*, 2005 WL 2335318 at \*4. Since the alleged assault did not transpire during one of the enumerated acts recognized under *Pooler*, entry of summary judgment in favor of the Defendant with respect to Millbrook’s FTCA allegations of assault and battery is warranted.

Finally, although Plaintiff also raises assertions of negligence in his Complaint, it is clear that the alleged assault and battery was intentional. Therefore, Millbrook has not stated a negligence claim upon which relief can be

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ed from other prisoners; however, because these claims are not asserted in the Complaint they are not properly before this Court.

granted. *See Hall v. United States*, 2008 WL 919605, \*5 (M.D. Pa. April 2, 2008) (Rambo, J.).

An appropriate Order will enter.

UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

|                  |   |                 |
|------------------|---|-----------------|
| KIN MILLBROOK,   | : | CIVIL ACTION    |
| Plaintiff        | : | NO. 3:11-cv-131 |
| v.               | : | (Judge Nealon)  |
| UNITED STATES OF | : |                 |
| AMERICA,         | : | [file stamp]    |
| Defendant        | : |                 |

**ORDER**

NOW, THIS 16<sup>th</sup> DAY OF FEBRUARY, 2012, in accordance with the Memorandum issued this date, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff's motion (Doc. 24) for summary judgment is **DEEMED WITHDRAWN**.
2. Defendant's dispositive motion is construed as solely seeking entry of summary judgment.
3. The Defendant's motion for summary judgment (Doc. 9) is **GRANTED**.
4. The Clerk of the Court is to **CLOSE** the case.

/s/ William J. Nealon

United States District Judge

FCO - 165

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUITNo. 12-1531Millbrook v. United States  
(M.D. Pa. No. 11-cv-00131)

To: Clerk

1) Application to Proceed In Forma Pauperis

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The foregoing motion to proceed in forma pauperis is granted. Appellant is a prisoner and seeks to proceed in forma pauperis on appeal. Appellant is required to pay the full \$455.00 fee in installments regardless of the outcome of the appeal. The Court hereby directs the warden or his or her designee to assess an initial filing fee of 20% of the greater of (a) the average monthly deposits to the prisoner's account; or (b) the average monthly balance in the prisoner's account for the six month period immediately preceding the filing of the notice of appeal. The warden, or his or her designee, shall calculate, collect, and forward the initial payment assessed in this order to the United States District Court for the Middle District of Pennsylvania. In each succeeding month when the amount in the prisoner's account exceeds \$10.00, the warden, or his or her designee, shall forward payments to the United State District Court for the Middle District of Pennsylvania equaling 20% of the preceding month's income credited to the prisoner's account until the fees are paid. Each payment shall reference the appellate docket number for this appeal.

The appeal will be submitted to a panel of this court for determination under 28 U.S.C. § 1915(e)(2) as to whether the appeal will be dismissed a legally frivolous or

whether summary affirmance under Third Circuit L.A.R. 27.4 and I.O.P. 10.6 is appropriate. In making this determination, the district court opinion and record will be examined. No briefing schedule will issue until this determination is made. Although not necessary at this time, appellant may submit argument, not to exceed 5 pages, in support of the appeal. The document, with certificate of service, must be filed with the clerk within 21 days of the date of this order. Appellee need not file a response unless directed to do so or until a briefing schedule is issued.

For the Court,

/s/ Marcia M. Waldron

Clerk

Dated: March 8, 2012

MB/cc: Kim Millbrook

G. Michael Thiel, Esq.



**ALD-155****NOT PRECEDENTIAL****UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**No. 12-1531**

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**KIM MILLBROOK, APPELLANT*****v.*****UNITED STATES OF AMERICA**

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**On Appeal from the United States District Court  
for the Middle District of Pennsylvania  
(D.C. Civil No. 11-cv-00131)  
District Judge: Honorable William J. Nealon**

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**Submitted for Possible Dismissal Pursuant to 28 U.S.C.  
§ 1915(e)(2)(B) or Summary Action Pursuant to Third Circuit  
LAR 27.4 and I.O.P. 10.6****April 12, 2012****Before: SLOVITER, FISHER and WEIS, Circuit Judges  
(Opinion filed April 23, 2012)**

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**OPINION**

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**PER CURIAM.**

Kim Millbrook, an inmate housed at the United States Penitentiary, Lewisburg Pennsylvania (USP-Lewisburg), appeals from an order of the District Court granting defendant's motion for summary judgment. For

substantially the same reasons provided by the District Court, we will affirm.

I.

Millbrook filed a complaint pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671–2680, naming as defendant the United States of America. According to the complaint, Millbrook was subjected to sexual assault while housed in the Special Management Unit (SMU) at USP–Lewisburg on or about March 5, 2010. On that date, Millbrook alleged that he was taken to the basement of the SMU and forced to perform oral sex on Correctional Officer Pealer while Correctional Officer Edinger held his neck and Correctional Officer Gimberling stood watch by the door. He also claimed that he was verbally assaulted during the incident.

Defendant filed a motion to dismiss or in the alternative for summary judgment, which the District Court granted. According to the defendant, Millbrook was involved in an altercation with his cell mate on the morning of March 4, 2010. As a result, both prisoners were placed in restraints and removed from their cell. They were then transferred to separate holding cells pending injury assessment and photographs. Millbrook claims that he was assaulted the next day by correctional staff. Following an internal investigation, which included a medical assessment, Millbrook's claim was found to be unsubstantiated.

After reviewing Millbrook's response to defendant's motion, the District Court concluded that the defendant was entitled to summary judgment because Millbrook's FTCA claim is precluded by *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986). This appeal followed.

## II.

We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over a district court's grant of summary judgment. *See Kaucher v. County of Bucks*, 455 F.3d 418, 422 (3d Cir. 2006). The District Court's grant of summary judgment will be affirmed if the record demonstrates that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c)*. An issue is material if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). We may summarily affirm if Millbrook's appeal presents no substantial question. *See* 3d Cir. L.A.R. 27.4 and 3d Cir. I.O.P. 10.6.

## III.

Millbrook contends that the defendant is liable under the FTCA for the alleged assault on March 5, 2010. Under 28 U.S.C. § 2680(h), the United States is generally not liable for intentional torts of its employees except for certain intentional torts committed by investigative or law enforcement officers. *See* 28 U.S.C. § 2680. We have limited claims that arise under § 2680(h) to cases in which an intentional tort is committed by a law enforcement or investigative officer while executing a search, seizing evidence, or making arrests for violations of federal law. *Pooler*, 787 F.2d at 872. Defendant argued that because the alleged assault did not arise out of conduct during an arrest, search, or seizure, Millbrook's tort claim is not cognizable.

Defendant did not dispute that correctional officers may be deemed law enforcement officers for purposes of the FTCA. Assuming arguendo that they are, to the extent that Millbrook alleges that handcuffing and taking

him to the basement of the SMU amounts to an unconstitutional seizure, we agree with the District Court that *Pooler* limits the term "seizure" to the seizure of evidence. *Id.* Further, Millbrook did not allege that the alleged conduct occurred in the course of an arrest for a violation of federal law, or during the course of a search. See 28 U.S.C. § 2680(h). Thus, we agree with the District Court that while the alleged conduct is troubling, Millbrook has not shown that he is entitled to relief under the FTCA.<sup>1</sup>

As Millbrook's appeal presents no substantial question, we will summarily affirm the District Court judgment. See 3d Cir. L.A.R. 27.4 and 3d Cir. I.O.P. 10.6. Millbrook's motions for appointment of counsel are denied.

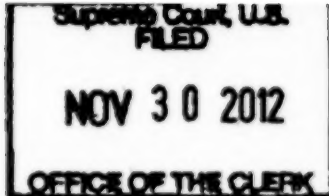
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<sup>1</sup> We also agree with the District Court that although Millbrook raises assertions of negligent behavior on the part of the correctional officers, it is clear that the alleged actions were intentional. Indeed, Millbrook stated in his complaint that he was "sexually assaulted and battered maliciously with evil intent by officers Pealer, Edinger and Gimberling." See Complaint at 5. Therefore, we agree that he did not state a negligence claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6).

# **PETITIONER'S BRIEF**

RECORD  
AND  
BRIEFS

No. 11-10362



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**In the Supreme Court of the United States**

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KIM MILLBROOK, PETITIONER

v.

UNITED STATES, RESPONDENT

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

**BRIEF OF PETITIONER**

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## **QUESTION PRESENTED**

Whether 28 U.S.C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of federal law."



**PARTIES TO THE PROCEEDINGS**

Petitioner is Kim Millbrook. Respondent is the United States.

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## OPINIONS BELOW

The non-precedential opinion of the United States Court of Appeals for the Third Circuit is reported at 477 Fed. Appx. 4, and reprinted at J.A. 101–104. The unreported opinion of the United States District Court for the Middle District of Pennsylvania is reprinted at J.A. 89–97.

## JURISDICTION

The judgment of the court of appeals was entered on April 23, 2012. No further rehearing was sought. The petition for a writ of certiorari was filed on May 10, 2012, and was granted on September 25, 2012. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.* Section 1346(b)(1) of the FTCA provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

Section 2674 of the FTCA provides:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674.

Section 2680 of the FTCA provides, in relevant part:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

\* \* \*

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative



or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(a), (h).

## STATEMENT

Petitioner Kim Millbrook is an inmate in federal prison. His complaint alleges that he was physically assaulted, sexually abused, and verbally threatened by prison guards. The question presented is whether the FTCA waives sovereign immunity for such serious abuses by law enforcement officers when their conduct takes place outside the context of an arrest, search, or seizure.

1. The FTCA waives the United States’ sovereign immunity for monetary claims “for \* \* \* personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,” to the extent that “the United States, if a private person, would be liable to the claimant in accordance with the law of the place” where the conduct occurred. 28 U.S.C. § 1346(b)(1); see also 28 U.S.C. § 2674.

This “broad waiver of sovereign immunity” is limited by a series of exceptions set forth in 28 U.S.C. § 2680. *Smith v. United States*, 507 U.S. 197, 206–207 (1993). The “intentional-tort exception” at issue in this case is codified at 28 U.S.C. § 2680(h). It exempts from the general waiver of sovereign immunity “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” 28 U.S.C. § 2680(h).



However, the intentional-tort exception is itself cabined by a statutory caveat—often referred to as the “law enforcement proviso”—which waives sovereign immunity for “any claim” of “assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution” arising out of the acts or omissions of federal “investigative or law enforcement officers.” *Ibid.* The statute defines “investigative or law enforcement officer” to mean “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” *Ibid.*

Most federal courts, in accord with the statute’s plain language, interpret this proviso to cover any of the enumerated torts committed by a federal law enforcement officer within the scope of his or her employment.<sup>1</sup> The Third Circuit, however—alone among the courts of appeals—holds that the proviso applies only to torts committed by law enforcement officials *in the course of a search, seizure, or arrest*. See *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986). The court below applied

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<sup>1</sup> See, e.g., *Ignacio v. United States*, 674 F.3d 252, 254–256 (4th Cir. 2012); *Reynolds v. United States*, 549 F.3d 1108, 1114 (7th Cir. 2008); *Sami v. United States*, 617 F.2d 755, 764–765 (D.C. Cir. 1979); *Flores-Romero v. United States*, No. 07–3269–SAC, 2011 WL 4526771, \*3–\*5 (D. Kan. Sept. 28, 2011); *King v. United States*, No. 2:09CV00163 JMM/HDY, 2010 WL 2710471, \*2 (E.D. Ark. May 21, 2010); *Ortiz v. Pearson*, 88 F. Supp. 2d 151, 154–155 (S.D.N.Y. 2000); *Harris v. United States*, 677 F. Supp. 403, 404–406 (W.D.N.C. 1988); *Crow v. United States*, 650 F. Supp. 556, 569–571 (D. Kan. 1987). But see *Orsay v. United States Dep’t of Justice*, 289 F.3d 1125, 1132–1136 (9th Cir. 2002) (limiting waiver to acts committed by law enforcement officers “in the course of investigative or law enforcement activities”); *Murphy v. United States*, 121 F. Supp. 2d 21, 24–25 (D.D.C. 2000) (same); *Employers Ins. of Wausau v. United States*, 815 F. Supp. 255, 259 (N.D. Ill. 1993) (same).

this rule to bar Petitioner's claim, and this Court granted certiorari to consider the viability of the Third Circuit's rule.

2. As both the district court and the court of appeals noted, the factual allegations of this case are "troubling." J.A. 96, 104.<sup>2</sup>

Petitioner Kim Millbrook is a prisoner incarcerated in the Special Management Unit at United States Penitentiary Lewisburg (USP Lewisburg). J.A. 10. On March 5, 2010, shortly after being transferred to USP Lewisburg, Millbrook was taken to a basement holding cell by a prison officer. J.A. 11, 35, 71. The officer who had transported Millbrook later returned with two other officers. J.A. 36, 71. Millbrook was placed in restraints and removed from the cell. J.A. 71. One officer placed Millbrook in a choke hold and forced him to his knees. J.A. 11, 36, 72. Millbrook was then forced to perform oral sex on the second officer. *Ibid.* Throughout the incident, the third officer "stood watch" by the door. J.A. 11, 71. The officers warned Millbrook that if he told anyone about the assault, they would kill him. J.A. 36, 72.

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<sup>2</sup> The facts recited here are taken from Millbrook's complaint (J.A. 9–13), his sworn affidavit made to Bureau of Prisons (BOP) investigators and submitted to the district court (J.A. 35–37), and his sworn declaration filed in opposition to the United States' motion to dismiss or, in the alternative, for summary judgment (J.A. 68–75). The district court granted summary judgment in favor of the United States as to all claims. In reviewing a decision granting summary judgment, a court "must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982). Accordingly, to the extent that the record contains factual disputes, this Court must accept Millbrook's proffered evidence as true for purposes of this appeal.

3. Millbrook filed an administrative tort claim with the BOP, which was denied. J.A. 11. Millbrook's administrative appeals were also denied. *Ibid.*

4. On January 18, 2011, Millbrook filed a *pro se* complaint in the district court against the United States under the FTCA, asserting both negligence and the intentional torts of assault and battery. J.A. 3, 9–13. The United States moved to dismiss the suit or, in the alternative, for summary judgment. J.A. 3–4, 82–88.

The district court granted summary judgment for the United States as to all counts. J.A. 89–97. The court held that Millbrook's intentional tort claims were not actionable because they fell within the FTCA's intentional-tort exception. J.A. 94–96. The court recognized that the correctional officers alleged to have assaulted Millbrook were "law enforcement officers for purposes of the FTCA." J.A. 94. However, it read the Third Circuit's decision in *Pooler* to hold "that § 2680(h) waives the government's sovereign immunity only in those cases in which a law enforcement or investigative officer commits one of the enumerated intentional torts 'while executing a search, seizing evidence, or making an arrest.'" J.A. 94 (quoting *Pooler*, 787 F.2d at 872).

The court concluded that the alleged conduct did not take place in the course of an arrest or a search. J.A. 96. And, citing Third Circuit precedent holding that "seizure for purposes of § 2680(h) refers only to the seizure of evidence," it rejected Millbrook's argument that he had been "seized" when he was placed in restraints and taken

to the basement of the prison. J.A. 95–96 (citing *Pooler*, 787 F.2d at 872).<sup>3</sup>

5. The court of appeals summarily affirmed in a non-precedential, per curiam opinion. J.A. 101–104. Citing *Pooler*, the court stated that “we have limited claims that arise under § 2680(h) to cases in which an intentional tort is committed by a law enforcement or investigative officer while executing a search, seizing evidence, or making arrests for violations of federal law.” J.A. 103. It held that Millbrook had not alleged that the officers’ “conduct occurred in the course of an arrest \* \* \* or during the course of a search,” and that the “seizure” he alleged did not qualify because it was not a “seizure of evidence.” J.A. 103–104. Consequently, the court of appeals concluded that, “while the alleged conduct is troubling, Millbrook has not shown that he is entitled to relief under the FTCA.” J.A. 104.

## SUMMARY OF ARGUMENT

I. Nothing in the text of § 2680(h)’s law enforcement proviso limits its waiver of sovereign immunity to conduct occurring in the course of an arrest, search, or seizure. To the contrary, the statute’s plain language expressly extends the waiver to “*any* claim” arising from the commission of one of the enumerated intentional torts by a federal law enforcement officer acting within the scope of his or her employment—without limitation. The subsection’s only reference to arrests, searches, or seizures is in a clause defining the statutory term “investigative or law enforcement officers.” While that language identifies the class of individuals whose conduct is covered by the pro-

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<sup>3</sup> The district court also concluded that Millbrook had not stated an actionable negligence claim because “it is clear that the alleged assault and battery was intentional.” J.A. 96–97.

viso, it does not limit the type of conduct which is covered. Had Congress wished to restrict its waiver of sovereign immunity to conduct relating to arrests, searches, or seizures, it easily could have. But it did not.

Moreover, the Third Circuit's unduly narrow reading of the law enforcement proviso would effectively read two of the provision's enumerated torts—malicious prosecution and abuse of process—out of the statute. Both of these offenses typically involve conduct which occurs during the charging decision or after a formal criminal charge has been filed, while arrests, searches, and seizures are pre-indictment activities. It is difficult to imagine how a federal officer could commit either malicious prosecution or abuse of process in the course of carrying out an arrest, search, or seizure. Affirming the Third Circuit's interpretation would thus violate the basic canon that a statute should not be read in a way that would render any of its provisions void or inoperative.

II. While the statute's unambiguous text should be both the beginning and the end of this Court's interpretive inquiry, other tools of statutory construction reinforce its plain language.

The Third Circuit relied heavily on legislative history in restricting the scope of the law enforcement proviso. While it is true that the incidents which appear to have motivated the passage of the proviso involved unlawful searches, the legislative history makes clear that Congress did not intend to limit the scope of § 2680(h)'s waiver to such activities, but rather intended to cover "*any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of federal law.*" S. Rep. No. 93-588 (1974), reprinted in 1974 U.S.C.C.A.N. 2789, 2790 (em-



phasis added). This apparent legislative intent is reflected in the inclusive language of the statute.

This Court's opinion in *Carlson v. Green*, 446 U.S. 14 (1980), further confirms petitioner's reading of the statute. The Court presumed that the petitioners in that case—who had brought a *Bivens* action challenging alleged intentional torts by prison officers outside the context of any arrest, search, or seizure—also had an action under the FTCA. Although *Carlson's* discussion of § 2680(h) is dicta, it is significant that this Court, reading the plain language of the proviso not long after its enactment, found no suggestion that the scope of its waiver was limited to arrests, searches, or seizures.

III. The FTCA's "discretionary function exception," 28 U.S.C. § 2680(a), exempts from the statute's general waiver of sovereign immunity conduct by federal officers in which they exercise discretionary judgment grounded in considerations of public policy. The Third Circuit has attempted to justify its narrow interpretation of § 2680(h)'s law enforcement proviso as a means of harmonizing the two provisions. If § 2680(h)'s waiver is limited to conduct occurring in the course of arrests, searches, and seizures, the argument goes, it will minimize overlap with the type of "discretionary functions" exempted from waiver in § 2680(a)—and thus obviate the need to determine which provision trumps the other, an issue which has split the other courts of appeals.

This argument is both unpersuasive and irrelevant to the case before the Court. The Government never raised the discretionary function exception as a defense below. And even if it had, the exception would not apply to these facts. The conduct alleged here—like most operational, on-the-ground law enforcement decisions—does not involve the kind of public policy considerations required to

qualify for the exception. And the discretionary function exception does not extend to conduct which—like the physical and sexual assault alleged here—violates a legal mandate.

This Court should also reject the Third Circuit's decision to preemptively narrow the scope of the law enforcement proviso in order to "protect" it from possible conflict with the discretionary function exception. Most of what law enforcement officers do is on the operational—and not the policy-making—level, and therefore will not implicate the discretionary function exception. But even if this Court were to conclude that there is an irreducible conflict between the two provisions, the proper resolution would be to hold that the law enforcement proviso—the later-enacted, more specific provision—trumps the discretionary function exception.

IV. Finally, this Court should decline to follow the handful of federal courts which, relying on subjective policy preferences rather than statutory text, have chosen to split the difference between the inclusive plain language of § 2680(h) and the Third Circuit's restrictive reading by limiting the subsection's waiver to conduct occurring "in the course of investigative or law enforcement activities." See *Orsay v. United States Dep't of Justice*, 289 F.3d 1125, 1132–1136 (9th Cir. 2002).

This judicially-created restriction has no more textual pedigree than the Third Circuit's "arrest, search, or seizure" limitation: The plain language of § 2680(h) refers to "any claim" arising out of an intentional tort by a law enforcement officer; it is not limited to claims arising in the course of law enforcement *activities*. And the parade of horrors marched out to justify this unduly restrictive reading is, on closer examination, not all that horrible at all. At worst, giving the statutory language its natural



meaning would result in the occasional waiver of immunity in a workplace dispute involving law enforcement personnel. While such disputes are likely not the paradigm cases Congress had in mind when it enacted the proviso, the waiver of sovereign immunity in such infrequent cases is hardly the kind of absurd result that would justify a court rewriting the text of the statute. At any rate, the improper conduct alleged in this case is far closer to core “law enforcement activities” than to the workplace torts that would be excluded by this rule.

### **ARGUMENT**

#### **Section 2680(h)’s Law Enforcement Proviso Is Not Limited To Conduct That Occurs In The Course Of An Arrest, Search, Or Seizure.**

While § 2680(h) exempts claims based on certain intentional torts from the FTCA’s general waiver of sovereign immunity, the statute contains an exception to that exception. The law enforcement proviso provides that, “with regard to acts or omissions of investigative or law enforcement officers of the United States Government,” sovereign immunity *is* waived for “any claim arising \* \* \* out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.” 28 U.S.C. § 2680(h).

There is no dispute that the acts alleged here constitute assault and battery, two of the intentional torts enumerated in the proviso. Nor is there any dispute that the correctional officers whose conduct is at issue qualify as “investigative or law enforcement officers” under the FTCA, as the United States conceded and the courts below assumed. J.A. 54 (United States concedes that “[t]here is no dispute that a correctional officers [sic] are

law enforcement officers”), 94, 103.<sup>4</sup> And there is no dispute that the correctional officers, in carrying out those actions, were acting within the scope of their employment, as required by 28 U.S.C. § 1346(b)(1). J.A. 55 (United States concedes that officer “was acting within the scope of his employment when the alleged assault occurred”), 85 (same).<sup>5</sup>

This case therefore turns on whether the court of appeals was correct to limit the law enforcement proviso to conduct which occurs in the course of an arrest, search, or seizure. The plain language of the statute, its legislative history, and this Court’s own precedent all demon-

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<sup>4</sup> See also, e.g., *McCarthy v. Madigan*, 503 U.S. 140, 154 n.6 (1992) (noting “Attorney General’s concession that corrections guards are ‘law enforcement’ officers within the meaning of the exception to the intentional-tort exception of the FTCA”); *ABC v. DEF*, 500 F.3d 103, 110 (2d Cir. 2007) (holding that federal prison officers are “law enforcement officers” under § 2680(h)), vacated and remanded on other grounds, 553 U.S. 1016 (2008); *Morrow v. Federal Bur. of Prisons*, 255 Fed. Appx. 378, 380 (11th Cir. 2007) (same); *Chapa v. United States Dep’t of Justice*, 339 F.3d 388, 390 (5th Cir. 2003) (same); *Hernandez v. Lattimore*, 612 F.2d 61, 64 n.7 (2d Cir. 1979) (same); *Sheppard v. United States*, 537 F. Supp. 2d 735, 791–792 (D. Md. 2008) (same); *Calderon v. Foster*, No. 5:05-cv-00696, 2007 WL 1010383, \*14 (S.D.W. Va. March 30, 2007) (same); *McLittle v. United States*, No. 03-2870 B/V, 2005 WL 2436714, \*4 (W.D. Tenn. Sept. 29, 2005) (same); 18 U.S.C. § 3050 (empowering officers and employees of the Bureau of Prisons to make arrests under specified circumstances); see also *Ali v. Federal Bur. of Prisons*, 552 U.S. 214 (2008) (holding that federal prison officers are “law enforcement officers” under § 2680(c) of the FTCA).

<sup>5</sup> “[T]he [law enforcement] proviso does not relax the FTCA’s jurisdictional mandate requiring that torts be committed within the scope of employment, nor does it alter the FTCA’s reliance on applicable state law, which also generally includes a scope of employment requirement, as the basis for defining an underlying cause of action.” *Ignacio*, 674 F.3d at 255.

strate that such a reading is untenable. The Third Circuit's holding to the contrary must be reversed.

**I. The Statutory Text Does Not Confine The Scope Of The Waiver To Conduct Occurring In The Course Of An Arrest, Search, Or Seizure.**

**A. The plain language of the law enforcement proviso contains no arrest, search, or seizure requirement.**

1. "As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Section 2680(h)'s text imposes only two requirements for the waiver of sovereign immunity: (1) that the act complained of constitute one of the enumerated intentional torts, and (2) that the individual committing the act fit the statutory definition of an "investigative or law enforcement officer." See *Ignacio*, 674 F.3d at 255. Where, as here, "the statutory language is plain," this Court "must enforce it according to its terms." *Jimenez*, 555 U.S. at 118; see also *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

The fact that this case involves a waiver of the United States' sovereign immunity does not alter this basic principle of statutory interpretation. The FTCA "waives the Government's immunity from suit in sweeping language." *Dolan v. Postal Serv.*, 546 U.S. 481, 492 (2006) (quoting *United States v. Yellow Cab Co.*, 540 U.S. 543, 547 (1951)). As a consequence,

the general rule that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign," \* \* \* is unhelpful in the FTCA context, where "unduly gen-

erous interpretations of the exceptions run the risk of defeating the central purpose of the statute.”

*Dolan*, 546 U.S. at 491–492 (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996); *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984)); see also *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (“We have on occasion narrowly construed *exceptions* to waivers of sovereign immunity where that was consistent with Congress’ clear intent, as in the context of the ‘sweeping language’ of the FTCA.”) (quoting *Yellow Cab*, 540 U.S. at 547) (emphasis added); *Block v. Neal*, 460 U.S. 289, 298 (1983) (“The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.”) (citation and internal quotation marks omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 284 (2012) (“the rigor with which courts have applied the interpretive rule disfavoring waivers of sovereign immunity has abated—rightly so”).

Rather, “the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify ‘those circumstances which are within the words and reason of the exception’—no less and no more.” *Dolan*, 546 U.S. at 853 (quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984) (quoting *Dalehite v. United States*, 346 U.S. 15, 31 (1953))).

2. Here, the words of the law enforcement proviso are unambiguous. The statute’s plain language does not state—or even suggest—that the proviso’s waiver of sovereign immunity is limited to conduct that takes place in the course of an arrest, search, or seizure. To the contrary, the statute extends the waiver to “*any* claim” against

a federal law enforcement officer for one of the enumerated torts. 28 U.S.C. § 2680(h) (emphasis added).

Congress' reference to "any" claim demonstrates that the proviso's scope is "expansive" and "unqualified," and "undercuts the attempt to impose [a] narrowing construction." *Salinas v. United States*, 522 U.S. 52, 56–57 (1997). This Court has repeatedly recognized that use of the word "any" signifies a "broad" meaning and a "wide reach." See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1332 (2011) ("'any complaint' suggests a broad interpretation that would include an oral complaint") (emphasis in original); *Boyle v. United States*, 556 U.S. 938, 954 (2009) ("[t]he term 'any' ensures that the definition has a wide reach"); *Republic of Iraq v. Beaty*, 556 U.S. 848, 856 (2009) ("Of course the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning,' giving us no warrant to limit the class of provisions of law that the President may waive.") (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) (statute's "sweeping" definition of "air pollutant" "embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any'"); *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("'any' has an expansive meaning"); *Gonzales*, 520 U.S. at 5 (statutory phrase "any other term of imprisonment" provides "no basis in the text for limiting [the provision] to federal sentences").

As this Court noted in a recent case construing another of § 2680's exceptions, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"*Ali*, 552 U.S. at 219 (quoting *Gonzales*, 520 U.S. at 5 (quoting Webster's Third New International Dictionary 97 (1976))). *Ali* involved § 2680(c)'s detention of property exception, which exempts from the FTCA's



waiver of sovereign immunity “[a]ny claim arising in respect of \* \* \* the detention of any \* \* \* property by any officer of customs or excise or any other law enforcement officer.” 28 U.S.C. § 2680(c). The petitioner argued that this language only barred claims against government officials with some nexus to customs or tax enforcement. The Court disagreed, concluding that “Congress’ use of ‘any’ to modify ‘other law enforcement officer’ is most naturally read to mean law enforcement officers of any kind.” *Ali*, 520 U.S. at 220.

Here, too, the Court should read “any claim” to mean a claim “of any kind” arising from a law enforcement officer’s commission of one of the enumerated torts—not just a claim arising from conduct occurring in the course of an arrest, search, or seizure. See *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

3. Nothing in § 2680(h)’s text or structure militates against this plain reading. As one court of appeals construing the statute recently emphasized, “[n]otably absent is language requiring an officer to commit the tort in the course of an investigative or law enforcement activity or, for that matter, any language regarding the context in which an officer must commit the tort.” *Ignacio*, 674 F.3d at 255.

The statute’s only mention of arrests, searches, or seizures is in the clause defining the term “investigative or law enforcement officer”:

For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h). By its terms, this language only identifies the *class of individuals* whose conduct can trigger a waiver of sovereign immunity. It does not purport to define the *type of conduct* required for waiver.<sup>6</sup> Rather, the conduct requirements are set forth in the main clause of the proviso, which waives sovereign immunity "with regard to acts or omissions of investigative or law enforcement officers of the United States Government \* \* \* to any claim arising \* \* \* out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." The text imposes no requirement that the conduct take place in the course of an arrest, search, or seizure. *Ibid.*

Had Congress intended to so limit the scope of the waiver, it easily could have done so. For example, it could have worded the proviso as follows:

That, with regard to acts or omissions of law enforcement officers of the United States Government *occurring while such officers are executing searches, seizures, or arrests* \* \* \* \*

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<sup>6</sup> "[T]he plain language of the provision at issue distinguishes between the *acts* for which immunity is waived—'assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution'—and the class of *persons* for whose acts immunity is waived—officers 'empowered by law to execute searches, to seize evidence, or to make arrests.' " *Ortiz*, 88 F. Supp. 2d at 154 (quoting 28 U.S.C. § 2680(h)).



*Harris*, 677 F. Supp. at 405 (emphasis added); see also *Ortiz*, 88 F. Supp. 2d at 151 (“It would have been easy enough for Congress to have provided that it was waiving immunity with regard to acts of law enforcement officers only *while* such officers are executing searches, seizures or arrests.”) (emphasis in original). But it did not do so. Rather, § 2680(h) waived sovereign immunity for “*any claim*” based on an enumerated intentional tort committed by federal agents who are “empowered by law” to conduct arrests, searches, or seizures—regardless of the context in which the particular tort is committed.

In short, the plain language of § 2680(h) “does not require that a law enforcement officer commit the intentional tort while executing a search, seizing evidence, or making an arrest.” *Reynolds*, 549 F.3d at 1114.

**B. Imposing an arrest, search, or seizure requirement would render meaningless the proviso’s references to malicious prosecution and abuse of process.**

1. “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction*, § 46.06, at 194 (6th ed. 2000)); see also *Connecticut Nat’l Bank*, 503 U.S. at 253 (“courts should disfavor interpretations of statutes that render language superfluous”).

The law enforcement proviso waives sovereign immunity for six enumerated intentional torts: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. 28 U.S.C. § 2680(h). It is difficult to imagine the circumstances under which two of these torts—malicious prosecution and abuse of process—could be committed in the course of an arrest,

search, or seizure. See *Ortiz*, 88 F. Supp. 2d at 165 (“under the *Pooler* interpretation, the provision of the statute waiving immunity as to claims of malicious prosecution would be rendered meaningless, because it is difficult to conceive of how a federal official could commit the acts constituting malicious prosecution in the course of an arrest, search or seizure”); *Crow*, 659 F. Supp. at 570 (“We are hard-pressed \* \* \* to understand how an officer can commit the acts constituting malicious prosecution while conducting a search or seizure or while making an arrest.”). Adopting the construction proponent by the Third Circuit would effectively read these two torts out of the statute.

2. The elements of the common law tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and, (4) actual malice. William L. Prosser, *Law of Torts* § 119, at 835 (4th ed. 1971); see also *Restatement (Second) of Torts* § 653 (1977). While precise formulations differ, numerous state courts have applied substantially these elements to malicious prosecution claims.<sup>7</sup>

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<sup>7</sup> See, e.g., *Palazzo v. Alves*, 944 A.2d 144, 152 (R.I. 2008); *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 792 (Tex. 2006); *Heib v. Lehrkamp*, 704 N.W.2d 875, 884 n.8 (S.D. 2005); *Casa Herrera, Inc. v. Beydoun*, 83 P.3d 497, 500 (Cal. 2004); *Condere Corp. v. Moon*, 880 So.2d 1038, 1042 (Miss. 2004); *Smith-Hunter v. Harvey*, 734 N.E.2d 750, 752–753 (N.Y. 2000); *Adams v. Whitfield*, 290 So. 2d 49, 51 (Fla. 1974); *Hibernia Nat'l Bank of New Orleans v. Bolleter*, 390 So. 2d 842 (La. 1980); *Cook v. Lanier*, 147 S.E.2d 910, 913 (N.C. 1966); *Reynolds v. Menard, Inc.*, 850 N.E.2d 831, 837 (Ill. App. 2006).

These elements make clear that “[t]he common-law cause of action for malicious prosecution \* \* \* unlike the related cause of action for false arrest or imprisonment, \* \* \* permits damages for confinement imposed *pursuant to legal process*.” *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (emphasis added). The tort is not complete until a criminal proceeding is actually commenced against the plaintiff. Indeed, most jurisdictions hold that a claim for malicious prosecution does not accrue for statute of limitations purposes until “the underlying criminal charges are filed”; a minority hold that it does not accrue until the criminal proceeding is favorably terminated. See *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 812–813 & n.5 (8th Cir. 2012) (collecting cases).

It is difficult to conceive of how a malicious prosecution claim could arise from “activities in the course of a search, a seizure or an arrest.” *Pooler*, 787 F.2d at 872. Searches, seizures, and arrests are pre-indictment activities, and a malicious prosecution claim can only arise after a criminal proceeding has been commenced. See *Albright v. Oliver*, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring) (“Albright’s reliance on a ‘malicious prosecution’ theory, rather than a Fourth Amendment theory, is anomalous. The principal player in carrying out a prosecution—in ‘the formal commencement of a criminal proceeding,’—is not police officer but prosecutor.”) (citation omitted).

The D.C. Circuit’s reasoning in *Dellums v. Powell*, 566 F.2d 216 (D.C. Cir. 1977), is instructive. In that case, a congressman who was arrested during a mass demonstration on the steps of the Capitol sued the police chief who had supervised the arrests for false arrest and malicious prosecution. *Id.* at 218–219. The court of appeals affirmed the verdict of liability for false arrest, but concluded that “[t]he record will not \* \* \* support Chief Wil-

son's liability for malicious prosecution." *Id.* at 219. It held that the chief's involvement in the arrest decision was not enough to support liability, absent any evidence that he had been involved in the decision to file criminal charges:

Wilson's involvement other than his personal control and supervision of all Metropolitan Police participating in the arrests was limited to participation in the arrest decision \* \* \* \* There is no evidence linking Wilson to the meeting on the evening of May 5 at which Chief Powell and Attorney Zimmerman convinced Attorneys Hannon and Moore to file informations.

*Ibid.* The court of appeal concluded that "the critical event triggering liability for malicious prosecution is the filing of an information. Having failed to link Chief Wilson with that decision, plaintiffs did not make out a prima facie case, and the judgment against him insofar as it awards damages for malicious prosecution must be vacated." *Id.* at 220; see also *Hartman v. Moore*, 547 U.S. 250, 262–263 (2006) (noting that a "plaintiff seeking damages incident to her criminal prosecution would have to show that the police, who allegedly acted in violation of law in securing her arrest, unduly pressured or deceived prosecutors") (quoting *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989)); *Dellums v. Powell*, 566 F.2d 167, 192–193 (D.C. Cir. 1977) ("the chain of causation between Chief Powell and the filing of the informations against plaintiffs is broken thereby defeating tort liability if the decision made by Attorney Moore was independent of any pressure or influence exerted by Chief Powell and of any knowing misstatements which Powell may have made").

Thus, to make out a malicious prosecution claim against a law enforcement officer, a plaintiff ordinarily must point to some act apart from the arrest, search, or seizure—for example, providing false information to the prosecutor—that improperly influenced the charging decision. But such conduct would never be covered under *Pooler's* narrow view of the law enforcement proviso. Because malicious prosecution claims do not ordinarily arise out of conduct incident to arrests, searches, or seizures, applying *Pooler's* rule would effectively read Congress' express waiver of sovereign immunity against claims of malicious prosecution by investigative or law enforcement officials out of the statute.

3. The *Pooler* rule would also vitiate the proviso's reference to abuse of process. Abuse of process is typically even further removed than malicious prosecution from the pre-indictment activities of arrest, search, and seizure.

While “[m]alicious prosecution ‘is concerned with maliciously causing process to issue,’ \* \* \* abuse of process ‘is concerned with the improper use of process *after* it has been issued.’” *Advantor Cap. Corp. v. Yeary*, 136 F.3d 1259, 1264 (10th Cir. 1998) (quoting *Jackson & Scherer, Inc. v. Washburn*, 496 P.2d 1358, 1366 (Kan. 1972)) (emphasis added); see also *Cook v. Sheldon*, 41 F.3d 73, 80 (2d Cir. 1994) (“While malicious prosecution concerns the improper issuance of process, ‘[t]he gist of abuse of process is the improper use of process after it is regularly issued.’”) (quoting 2 Committee on Pattern Jury Instructions, Ass’n of Supreme Court Justices, N.Y. Pattern Jury Instructions § 3:51, at 816 (1968)); Restatement (Second) of Torts § 682 (1977) (“[t]he subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed”).



As with malicious prosecution, the tort of abuse of process ordinarily cannot be committed until after a prosecution has been commenced: “[T]he gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.” W. Page Keeton *et al.*, Prosser & Keeton on the Law of Torts § 121, at 897 (5th ed. 1984) (footnote omitted). That is, a defendant must not only “secur[e] some process,” but also, “after that process ha[s] been secured, us[e] it in an improper way.” *Young v. Klass*, 776 F. Supp. 2d 916, 925 (D. Minn. 2011) (no abuse of process where “the ‘process’ at the heart of this case is simply Young’s arrest and subsequent tab charge for disorderly conduct and trespassing,” because “the facts do not support a separate claim that Klass abused that process *after* it was issued”) (emphasis in original).

As with malicious prosecution, any post-indictment behavior that might constitute abuse of process would be barred by *Pooler*’s arrest, search, or seizure requirement. Because the Third Circuit’s narrow reading of the law-enforcement proviso would effectively read the torts of malicious prosecution and abuse of process out of the statute, this Court should reject it.

**C. *Pooler* and its progeny failed to confront the plain language of § 2680(h).**

Neither the Third Circuit nor the handful of other courts following it made any serious attempt to analyze the plain language of § 2680(h) or to apply basic canons of statutory interpretation. Indeed, “[i]n *Pooler*, the Third Circuit did not address whether the statute was ambiguous but instead merely ‘read’ the limitation into the statute to better accord with its view of what ‘Congress in-



tended.’ ” *Ignacio*, 674 F.3d at 258 (Diaz, J., concurring). Compare *Brooks v. Silva*, No. 7:08–CV–105–KKC, 2009 WL 1211024, \*7 (E.D. Ky. May 1, 2009) (applying *Pooler* rule based on “the purpose and intent of the general rule: that the United States is not liable when a federal employee intentionally commits an assault and battery on someone”); *Palmer v. Gonzales*, 2009 WL 4799205, No. 3:07 CV 31, \*9 (N.D.W. Va. Dec. 7, 2009) (following *Pooler* “[b]ased on the underlying legislative history”).

This methodology runs afoul of a basic principle: that the “first step” in statutory construction “is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.’ ” *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). This first is often the last step: “The inquiry ceases ‘if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’ ” ” *Barnhart*, 534 U.S. at 450 (quoting *Robinson*, 519 U.S. at 340). That is the case here.

Neither *Pooler* nor the courts below could present any coherent explanation of why § 2680(h)’s text is ambiguous, or why its language defining the term “law enforcement officer” to include officials “empowered by law to execute searches, to seize evidence, or to make arrests” should be read to cabin the *categories of conduct* over which the proviso waives sovereign immunity. Their approach, which runs “run counter to the plain meaning of the subsection,” *Crow*, 659 F. Supp. at 570, and lacks “any principled underpinning,” *Ortiz*, 121 F. Supp. 2d 151, 164–65, should be rejected.

## II. Other Tools Of Statutory Interpretation Confirm That Congress Did Not Intend To Limit The Scope Of The Waiver To Conduct Occurring In The Course Of An Arrest, Search, Or Seizure.

### A. The legislative history supports a broad interpretation of the law enforcement proviso.

The legislative history of § 2680(h) confirms that Congress intended the law enforcement proviso to extend beyond conduct arising in the course of arrests, searches, or seizures of evidence. Of course, “reliance on legislative history is unnecessary” when a statute’s language is “unambiguous,” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1332 n.3 (2010), and this Court has cautioned against “allowing ambiguous legislative history to muddy clear statutory language,” *Milner v. Department of Navy*, 131 S. Ct. 1259, 1266 (2011). In this case, however, the legislative history of § 2680(h) does not muddy the inquiry; it simply confirms the plain meaning of the clear statutory text.

1. The law enforcement proviso to § 2680(h) was enacted in 1974. Pub. L. 93-253, § 2, 88 Stat. 50, 50 (1974).<sup>8</sup> The legislation was proposed in response to the “Collinsville raids,” in which federal agents conducted forcible, no-knock entries of two houses, only to discover that they were at the wrong addresses. See S. Rep. No. 93-588

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<sup>8</sup> Before the proviso was enacted, § 2680 “unequivocally barred (by excepting from sovereign immunity): ‘Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.’” *Nguyen v. United States*, 556 F.3d 1244, 1251 (11th Cir. 2009) (quoting 28 U.S.C. § 2680(h) (1970)).

(1974), reprinted in 1974 U.S.C.C.A.N. 2789, 2790.<sup>9</sup> Under § 2680(h) as it then stood, sovereign immunity barred the victims of the Collinsville raids from recovering damages from the Government. *Id.* at 2789–2790. The Senate Report on the 1974 legislation, which was relied on by the Third Circuit in *Pooler* to support its restrictive reading of the proviso, described the amendment in broad terms:

The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process.

*Ibid.* The Report did express particular concern over the kind of warrantless searches and seizures that had occurred in Collinsville:

This whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color

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<sup>9</sup> In the first Collinsville raid, federal agents smashed in the door of the Giglotto family's home, brandished pistols, subdued and handcuffed Mr. Giglotto, interrogated him at gunpoint, pointed a gun at Mrs. Giglotto as she pleaded for her husband's life, and ransacked the house. The agents later realized they were at the wrong address. Later that night, 25 agents from the same strike force forcibly entered the home of the Askew family. Mrs. Askew fainted as the agents searched the home and interrogated Mr. Askew at gunpoint. Once again, the agents later realized they were at the wrong address. See *Nguyen*, 556 F.3d at 1254–55 (citing 119 Cong. Rec. 14,084–14,085, 23,246).

of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued without probable cause.

*Id.* at 2790; see also *Pooler*, 787 F.2d at 872 (“The Senate Report on the amendment states that the proviso was enacted to provide a remedy against the United States in ‘situations where law enforcement officers conduct “no-knock” raids or otherwise violate the fourth amendment.”).

2. However, the very next sentence in the Senate Report—which the *Pooler* court, remarkably, ignored—made it clear that Congress did *not* intend to limit the law enforcement proviso to Fourth Amendment abuses in the context of searches, seizures, or arrests:

However, the Committee’s amendment should not be viewed as limited to constitutional tort situations but would apply to *any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of federal law.*

S. Rep. No. 93-588 (1974), reprinted in 1974 U.S.C.C.A.N. 2789, 2790 (emphasis added).

Congress expressly recognized that the law enforcement proviso would waive immunity as to conduct extending beyond the immediate controversy of no-knock raids. “While it is clear from the Senate Report that the Collinsville raids were the impetus for enacting the § 2680(h) proviso, it is equally as clear that the Report expresses the intent that the proviso not be limited to situations similar to the Collinsville raids.” *Harris*, 677 F. Supp. at 405; see also *Ortiz*, 88 F. Supp. 2d at 154 (“the legislative history makes clear that Congress did not intend to limit the waiver to torts arising from activities subject to Fourth Amendment scrutiny, notwithstanding

the fact that the legislation was motivated by particular instances of such activity”).

As this Court explained in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998), “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” Here, the legislative history shows that the principal impetus for the enactment of the law enforcement proviso was the Collinsville raids. But it also shows that Congress intended, not to limit the proviso’s waiver of immunity to Fourth Amendment abuses, but rather to extend it to “any case” in which a federal officer committed an enumerated intentional tort within the scope of his or her employment. This legislative intent perfectly tracks the plain language of the statute, which imposes no further restriction.

**B. This Court’s decision in *Carlson v. Green* supports a broad interpretation of the law enforcement proviso.**

This Court has not yet squarely ruled on whether the law enforcement proviso’s waiver should be limited to conduct occurring in the course of an arrest, search, or seizure. It has, however, spoken to the issue. In *Carlson v. Green*, 446 U.S. 14 (1980), the Court “implicitly assumed that the proviso of Section 2680(h) was not limited to acts committed while the agent is engaged in” an arrest, search, or seizure. *Harris*, 677 F. Supp. at 406.

In *Carlson*, the estate of a deceased federal prisoner brought a *Bivens*<sup>10</sup> action against prison officials who had

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<sup>10</sup> See *Bivens v. Six Unknown Fed. Narc. Agents*, 403 U.S. 388 (1971) (recognizing an implied cause of action for certain constitutional vio-



allegedly failed to provide the prisoner with adequate medical care. The defendants argued that the *Bivens* claim was precluded by the existence of an FTCA claim under § 2680(h), which they asserted was “an alternative remedy which [Congress] explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.” 446 U.S. at 18–19 (emphasis in original). While the Court rejected this argument, it indicated that it viewed the plaintiff’s claims as falling within § 2680(h)’s waiver of sovereign immunity:

In the absence of a contrary expression from Congress, § 2680(h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint *shall have an action under FTCA* against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.

446 U.S. at 20 (emphasis added). The Court expressed no concern that the actions complained of occurred outside the context of a search, seizure, or arrest.

*Carlson*’s observations on this matter are dicta, but they are persuasive dicta. Neither the litigants nor this Court, reading the plain language of § 2680(h), even suggested that it confined the waiver of immunity to the narrow circumstances set forth in *Pooler*. That is because there is nothing in the statutory text to support such a narrow reading. *Carlson* represented a fresh-eyes reading of the law enforcement proviso, untainted by the Third Circuit’s “distort[ion of] the plain language of the statute.” *Ortiz*, 88 F. Supp. 2d at 151. The Court should

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lations by federal officials, regardless of the existence of a statutory or common-law remedy).



reaffirm this reading, which is supported by both the statute's text and its legislative history.

### **III. This Court Need Not Read The Law Enforcement Proviso Narrowly In Order To Reconcile It With The Discretionary Function Exception of 28 U.S.C. § 2680(a).**

Ever since the law enforcement proviso was enacted in 1974, courts have attempted to harmonize its waiver of sovereign immunity with the FTCA's "discretionary function exception." That provision, codified at 28 U.S.C. § 2680(a), "generally shields the government from tort liability based on the acts or omissions of federal agencies and employees when they are exercising or performing a discretionary function." *Nguyen*, 556 F.2d at 1250 (citing *United States v. Gaubert*, 499 U.S. 315, 322–333 (1991)). The Third Circuit in *Pooler* relied in part on the need to accommodate this separate statutory provision to rationalize its narrow reading of the law enforcement exception:

Reading the intentional tort proviso as limited to activities in the course of a search, a seizure or an arrest as a practical matter largely eliminates the likelihood of any overlap between section 2680(a) and section 2680(h). It is hard to imagine instances in which the activities of officers engaging in searches, seizures or arrests would be anything other than operational.

787 F.2d at 872. This Court should reject that rationale. The plain language of the law enforcement proviso can comfortably co-exist with the discretionary services exception without reading the Third Circuit's extra-textual limitations into the statute.

1. The discretionary function exception, set forth in subsection (a) of § 2680, revokes the FTCA's waiver of sovereign immunity for

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). To determine whether a function is "discretionary," courts apply a two-step test. First, they ask whether the conduct "involv[es] an element of judgment or choice." *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). Second, they ask whether that judgment is grounded in "considerations of public policy." *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537).

2. Federal courts have grappled with "whether and how to apply the [discretionary function] exception in cases brought under the intentional tort proviso found in § 2680(h)." *Medina v. United States*, 259 F.3d 220, 224 (4th Cir. 2001). Some courts of appeals have held that even those claims specifically exempted by § 2680(h)'s law enforcement proviso are barred if they are based on the performance of discretionary functions within the meaning of § 2680(a).<sup>11</sup> Others have held that § 2680(h)'s waiver

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<sup>11</sup> See *Medina*, 259 F.3d at 224–226; *Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987); *Pooler*, 787 F.2d at 871–872; *Gray v. Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983); *Caban v. United States*, 671 F.2d 1230, 1234–1235 (2d Cir. 1982).

of sovereign immunity overrides the discretionary function exception.<sup>12</sup>

3. The Court need not resolve this circuit split in order to decide this case. The Government never raised the discretionary function exception as a defense in the proceedings below. And even if the exception were held to apply to claims falling within the law enforcement proviso, the conduct alleged in this case—the physical and sexual assault of a federal inmate by prison guards—is far outside its scope.

As an initial matter, operational, on-the-ground law enforcement decisions typically have not been held to involve the kind of discretionary judgment grounded in public policy analysis that is carved out by § 2680(a). See, e.g., *Garcia*, 826 F.2d at 809 (“While law enforcement involves exercise of a certain amount of discretion on the part of individual officers, such decisions do not involve the sort of generalized social, economic and political policy choices that Congress intended to exempt from tort liability.”); *Gray*, 712 F.2d at 508 (“[I]f the ‘investigative or law enforcement officer’ limitation in section 2680(h) is read to include primarily persons (such as police officers) whose jobs do not typically include discretionary functions, it will be rare that a suit under the proviso to section 2680(h) is barred by section 2680(a).”); *Caban*, 671 F.2d at 1234–1235 (INS officers’ decisions about whether to detain an alien were not a discretionary function).

Moreover, the unlawful nature of the alleged conduct here takes it even further outside the ambit of the discre-

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<sup>12</sup> See *Nguyen*, 556 F.3d at 1250–1260; *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987); see also *Moher v. United States*, — F. Supp. 2d. —, 2012 WL 2089849, \*22–24 (W.D. Mich. June 8, 2012).

tionary function exception. It is well-recognized that the exception does not encompass conduct that is “unconstitutional, proscribed by statute, or exceed the scope of an official’s authority.” *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003); see also *Palay v. United States*, 349 F.3d 418, 431 (7th Cir. 2003) (discretionary function exception does not apply where prison officials have “acted in direct contravention of BOP regulations”); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (“governmental conduct cannot be discretionary if it violates a legal mandate”); *Sutton*, 819 F.2d at 1293 (“[W]e have not hesitated to conclude that [an] action does not fall within the discretionary function [exception] of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution.”); *Gonzales v. United States*, No. 4:09CV00746 BSM/BD, 2010 WL 1407792, \*2 (E.D. Ark. Feb. 11, 2010) (discretionary function exception does not apply where prison officials “failed to follow policy”). Engaging in the rape and assault of an inmate is far outside the discretion afforded to a federal prison official.

4. Nor should the existence of the discretionary function exception impel this Court to adopt an unduly narrow construction of § 2680(h)’s law enforcement proviso, as the Third Circuit did in *Pooler*. Even those courts that apply the discretionary function exception to law enforcement activities have emphasized that conflicts between subsections (a) and (h) are rare, given that operational law enforcement decisions rarely contain the element of policy judgment necessary to render them “discretionary.” See *Garcia*, 826 F.2d at 809; *Gray*, 712 F.2d at 507–508; *Caban*, 671 F.2d at 1234–1235; see also *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983).

The rare claim which presents law enforcement conduct that rises to the level of a discretionary function can be decided on its own facts. Nothing warrants rewriting the plain language of § 2680(h)—adding an “arrest, search, or seizure” requirement for conduct that is nowhere mentioned in the statute’s text—simply to eliminate the infrequent and minor conflicts that might occur between that provision and § 2680(a). The Third Circuit’s misguided rule is an illustration of why it is neither appropriate nor desirable to hunt squirrels with a cannon.

5. Finally, if this Court were to conclude that there is an irreducible conflict between subsections (a) and (h), the proper resolution would be to conclude, as the Fifth and Eleventh Circuits have, that “sovereign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function.” *Nguyen*, 556 F.3d at 1256–1257.

As the Eleventh Circuit explained in *Nguyen*, “two fundamental canons of statutory construction \* \* \* provide the answer, which is that to the extent of overlap between [the law enforcement] proviso and subsection (a), the proviso wins.” *Id.* at 1252–1253. First, the law enforcement proviso, which applies only to claims for six specified torts arising from the acts of a defined subset of government officers, is more specific than the sweeping discretionary function exception. “[A] more specific statute will be given precedence over a more general one.” *Corley v. United States*, 556 U.S. 303, 316 (2009) (quoting *Busic v. United States*, 446 U.S. 398, 406 (1980)); see also *Scalia & Garner, supra*, at 183. Second, the law enforcement proviso was enacted in 1974, while the discretionary function exception has been part of the FTCA since 1946. “When a statute specifically permits what an earlier statute prohibited, or prohibits what it permitted, the earlier



statute is (no doubt about it) implicitly repealed.” *Id.* at 327; see also *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) (“[w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs”).

Thus, to the extent that the two subsections are incompatible, the Court should follow “the familiar principle of statutory construction that conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute”—here, the law enforcement proviso of § 2680(h)—“to amend an earlier, more general statute.” *Smith v. Robinson*, 468 U.S. 992, 1023 (1984).

#### **IV. The Statutory Text Does Not Confine The Scope Of The Waiver To Conduct Occurring In The Course Of Investigative Or Law Enforcement Activities.**

The question presented, as formulated by the Court, focuses on whether § 2680(h)’s waiver of sovereign immunity is limited to conduct occurring during the exercise of authority to carry out arrests, searches, or seizures. However, a handful of federal courts, while rejecting *Pooler*’s “arrest, search, or seizure” requirement, have nevertheless confined the law enforcement proviso’s application to conduct that occurs “in the course of investigative or law enforcement activities.” *Orsay*, 289 F.3d at 1132–1136; see also *Murphy*, 121 F. Supp. 2d at 24–25; *Employers Ins. of Wausau*, 815 F. Supp. at 259. This reading of the proviso, while somewhat more permissive than the Third Circuit’s interpretation, is equally unsupported by the plain language of the statute.

1. As discussed above, the plain text of § 2680(h) imposes only two conditions for waiver: (1) that an “investigative or law enforcement official,” defined as a federal



employee “authorized by law” to carry out arrests, searches, or seizures, (2) commit one of the six enumerated intentional torts. 28 U.S.C. § 2680(h). The only further limitation on the nature of the conduct covered is § 1346(b)’s generally-applicable requirement that it occur “within the scope of [the officer’s] office or employment.” 28 U.S.C. § 1346(b). Just as the statutory language imposes no requirement that the tort be committed in the course of an arrest, search, or seizure, it similarly imposes no requirement that the conduct occur in the course of law enforcement activities. Indeed, the phrase “investigative or law enforcement *activities*” appears nowhere in the statute.

This abandonment of the statute’s plain language was made explicit by the district court in *Employers Insurance of Wausau*. Citing legislative history, the court argued that imposing a law enforcement activities requirement on § 2680(h) “is not only its most reasonable construction in common-sense terms, but it also avoids converting the statutory proviso into one that is triggered by mere status rather than by actual conduct.” 815 F. Supp. at 259. But the plain text of the law enforcement proviso is quite clear as to both the status—an “investigative or law enforcement official,” as defined in the text—and the conduct—“any claim” arising from the commission of one of the six enumerated intentional torts—required to waive immunity. A court’s idiosyncratic view of “common sense” is no warrant for disregarding the plain language of the statute.

As the Fourth Circuit explained in rejecting this approach, the “law enforcement activities” requirement suffers from the same basic infirmity as *Pooler*’s “arrest, search, or seizure” requirement: “these courts relented to secondary modes of interpretation without first establishing the ambiguity of the statutory text.” *Ignacio*, 674

F.3d at 255. The fact that *Orsay*, *Wausau*, and their ilk draw the extra-textual line at a different point than *Pooler* does not make that line any more justifiable.

2. The prudential reasons put forward for the “law enforcement activities” limitation are unpersuasive. In *Orsay*, for example, the Ninth Circuit expressed concern that applying the law enforcement proviso’s waiver to “workplace torts” would impose a “bizarre” disparity between law enforcement officers and other federal employees:

By singling out investigative and law enforcement officers in section 2680(h), Congress provided a remedy for this kind of intentionally tortious conduct that arises in the context of investigative and law enforcement activities. Congress did not create a remedy for torts arising outside of this context, like the workplace torts that Appellants allege. To construe section 2680(h) otherwise—as reaching these workplace torts—would create an arbitrary distinction between investigative and law enforcement officers and other federal employees, and produce the bizarre result that suit lies against the United States when one federal law enforcement officer punches another in the office, but not when other federal employees engage in the same conduct.

289 F.3d at 1134.

The problem with this approach is that it ignores the plain language of § 2680(h): “[i]n *Orsay*, the Ninth Circuit found that the statute was ambiguous because it was ‘reasonably susceptible’ to multiple meanings but failed to explain how the meaning of the language employed in the statute was anything other than plain.” *Ignacio*, 674 F.3d at 258 (Diaz, J., concurring) (quoting *Orsay*, 289 F.3d at 1134). Rather, “the court proceeded directly to a

discussion of Congress's intent and the legislative history, without addressing the plain language of the statute." *Ignacio*, 674 F.3d at 258 (Diaz, J., concurring).

In any event, honoring the plain meaning of § 2680(h) "does not lead to absurd results requiring us to treat the text as if it were ambiguous." *Lamie*, 540 U.S. at 536. Even if the distinction Congress drew between law enforcement officers and other federal employees "may seem odd," it "is not absurd." *Exxon Mobil Corp. v. Alapattah Servs., Inc.*, 545 U.S. 546, 565 (2005). As one jurist has explained, "it is certainly plausible that Congress intended to hold law enforcement officers to a higher standard"—even in the workplace context—"given the important trust society places in them." *Ignacio*, 674 F.3d at 258 (Diaz, J., concurring); see also *Watson v. Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995) (in matters of employee discipline, "[l]aw enforcement officers are held to a higher standard of conduct than are other federal employees"); *Jones v. Department of Army*, 52 M.S.P.R. 501, 506 (1992) (same).

3. Even if this Court were inclined to reach beyond the statutory text to impose a law enforcement activities requirement, it would not affect the outcome of this case. The conduct alleged here—an assault by on-duty prison guards of a prisoner under their charge, occurring on prison grounds and under color of their federal authority—is fundamentally different than the "workplace torts" at issue in cases like *Orsay*.<sup>13</sup> "The instant action is thus

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<sup>13</sup> *Orsay* concerned a workplace dispute involving a supervising federal marshal pointing a loaded gun at employees. 289 F.3d at 1136. *Murphy* similarly involved a workplace dispute in which a Secret Service supervisor allegedly assaulted an agent by "delivering a tirade of profanity" and "advancing toward Plaintiff and physically challenging him." 121 F. Supp. 2d at 23.

distinguishable from cases finding the proviso did not apply to allegations involving a federal employee in a workplace incident, or a federal employee acting at the time under a completely different authority or responsibility.” *Flores-Romero*, 2011 WL 4526771, at \*5 (holding that § 2680(h) waived sovereign immunity for prisoner’s claim that he was physically assaulted by prison guard “for no reason”).

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2012

# **RESPONDENT'S BRIEF**

**In the Supreme Court of the United States**

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KIM MILLBROOK, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
SUPPORTING REVERSAL AND REMAND**

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## QUESTION PRESENTED

Whether 28 U.S.C. 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of Federal law."



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# In the Supreme Court of the United States

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No. 11-10362

KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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BRIEF FOR THE UNITED STATES  
SUPPORTING REVERSAL AND REMAND

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## OPINIONS BELOW

The opinion of the court of appeals (J.A. 101-104) is not published in the *Federal Reporter* but is reprinted at 477 Fed. Appx. 4. The opinion of the district court (J.A. 89-97) is not published in the *Federal Supplement* but is available at 2012 WL 526000.

## JURISDICTION

The judgment of the court of appeals was entered on April 23, 2012. The petition for a writ of certiorari was filed on May 10, 2012, and the petition was granted on September 25, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is an inmate in the custody of the Federal Bureau of Prisons (BOP). In 2007, a federal jury

found petitioner guilty on one count of possessing a fire-arm after having been convicted of a felony, one count of possessing with intent to distribute cocaine base, three counts of witness tampering, and one count of witness retaliation. See *United States v. Millbrook*, 553 F.3d 1057, 1059-1060 (7th Cir. 2009); J.A. 23. The district court sentenced petitioner to 372 months of imprisonment, to be followed by eight years of supervised release. 553 F.3d at 1059; J.A. 23-24. While incarcerated before his trial and after his conviction, petitioner filed multiple administrative complaints and district court actions falsely alleging misconduct by correctional officers.<sup>1</sup>

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<sup>1</sup> See, e.g., *Millbrook v. United States*, No. 2:10-cv-245, 2012 WL 1014977, at \*5 (S.D. Ind. Mar. 23, 2012) (concluding that petitioner's sworn allegations of misconduct by correctional officers at the United States Penitentiary (USP) at Terre Haute, Indiana were "utterly discredited by the video record of the incident" such that "no reasonable jury could believe [petitioner's] version of what occurred"); *Millbrook v. Cosby*, No. 4:07-cv-4023, 2009 WL 2913449, at \*9 (C.D. Ill. Sept. 4, 2009) (concluding that "medical records belie [petitioner's] claim" of deliberate indifference by medical personnel and that petitioner provided nothing to support "his bare accusation" that his "medical records have been altered"); *Millbrook v. Prine*, No. 4:06-cv-4043, 2007 WL 2937129, at \*2, \*5 (C.D. Ill. June 28, 2007) (concluding that videotape evidence, which showed that correctional officers did not use excessive force, directly contradicted petitioner's assertion that officers slammed his head into an elevator door and "choke[d] him to the point that he almost passed out"). Cf. J.A. 14 (petitioner's statement that he has been "constantly writing complaints on staff" at USP Lewisburg); J.A. 48 (noting petitioner's pretrial incarceration began January 10, 2006).

Petitioner additionally has several pending actions seeking damages for alleged misconduct by government officials. E.g., *Millbrook v. Potter*, No. 3:12-cv-1284 (M.D. Pa.) (filed July 5, 2012); *Millbrook v. United States*, No. 3:12-cv-421 (M.D. Pa.) (filed Mar. 7, 2012); *Millbrook v. Swick*, No. 2:10-cv-246 (S.D. Ind.) (filed Sept. 13, 2010).

a. In this case, petitioner alleges that he was physically and sexually assaulted at the United States Penitentiary at Lewisburg, Pennsylvania (USP Lewisburg), by BOP Correctional Officer Jeffrey Pealer and Lieutenant Mathew Edinger in the presence of Correctional Officer Kevin Gemberling. J.A. 11-12; cf. J.A. 33-34. BOP operates USP Lewisburg as a Special Management Unit (SMU) for inmates who are “difficult to manage in typical high security institutions,” including gang leaders and “highly disruptive” inmates. BOP, U.S. Dep’t of Justice, *State of the Bureau 2010*, at 5 (2012), <http://www.bop.gov/news/PDFs/sob10.pdf>. The conditions of confinement at an SMU are more restrictive than those at institutions for general-population inmates, but inmates transferred to an SMU may later be redesignated to another facility if they successfully complete the SMU program. BOP, U.S. Dep’t of Justice, *Program Statement No. 5217.01, Special Management Units* §§ 1, 5-6 (2008), [http://www.bop.gov/policy/progstat/5217\\_001.pdf](http://www.bop.gov/policy/progstat/5217_001.pdf).<sup>2</sup>

The summary judgment record shows that, in 2009, while petitioner was incarcerated at the United States Penitentiary at Terre Haute, Indiana, BOP designated petitioner for transfer to an SMU over his objection, based on petitioner’s “history of serious and disruptive disciplinary infractions” and his “participat[ion] in or \* \* \* associat[ion] with activity such that greater management of [his] interaction with other persons [was] necessary.” J.A. 19; see J.A. 69, 73. Compare J.A. 76 (noting that petitioner was in a Special Housing Unit at USP Terre Haute) with 28 C.F.R. 541.20-541.33 (special-

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<sup>2</sup> BOP operates five SMUs nationally, with USP Lewisburg as its only institution operated primarily as an SMU. *State of the Bureau 2010*, at 5.

housing-unit regulations). On March 1, 2010, BOP transferred petitioner to the SMU at USP Lewisburg. J.A. 14, 69.

A few days later, in the early morning of March 4, 2010, petitioner came to blows with his cellmate in their cell. J.A. 25, 78. BOP officers promptly separated the two by temporarily placing them in shower areas; examined both inmates for injuries around 5:00 a.m.; and photographed the inmates around 5:45 a.m. J.A. 25-26.

That same morning, BOP personnel conducted an area search (colloquially known as a "shakedown") of the G-Block at USP Lewisburg by moving inmates out of their cells, searching the cells, and then returning the inmates. J.A. 27, 29, 31. Officers Pealer and Brian Wert were assigned to the unit's second floor. J.A. 27, 29. During the search, Officers Pealer and Wert followed instructions to escort an inmate who had engaged in disruptive behavior (Inmate #2) to a basement holding cell. J.A. 28, 30. It also appears that petitioner was moved from the shower area to a basement holding cell near Inmate #2 during the area search.

b. The next morning (March 5), petitioner reported to BOP personnel that, after his fight with his cellmate the day before, he had been moved to a shower area and then to a basement holding cell, where one BOP officer allegedly "choked [petitioner] until he almost lost consciousness" and Officer Pealer allegedly forced petitioner to perform a sex act on the officer before allegedly threatening to kill petitioner if he reported the incident. J.A. 38, 45-46; see J.A. 35-37 (petitioner's March 5, 2010 affidavit).

Petitioner's allegations triggered a series of actions by BOP consistent with BOP's procedures for the prompt intervention by officials and the appropriate in-



vestigation of allegations of sexual abuse. See BOP, U.S. Dep't of Justice, *Program Statement No. 5324.06, Sexually Abusive Behavior Prevention and Intervention Program* (2005) (rescinded 2012).<sup>3</sup> First, at approximately 9:30 a.m. on March 5, petitioner was brought from his cell to USP Lewisburg's health services clinic, where the institution's clinical director assessed petitioner for trauma. J.A. 38; see J.A. 45. The doctor's contemporaneous report indicates that petitioner repeated his allegations three times before a BOP Captain and Special Investigative Agent, altering the time of the alleged assault "with each telling." J.A. 38. The examination identified bruising and a hematoma "around [petitioner's] left eye from [his] cell fight [the] day before," but, despite petitioner's assertion that officers had "choked [him] until he almost lost consciousness," the doctor found "[n]o evidence of any trauma to [petitioner's] neck," which "had no signs of bruising or abrasions." J.A. 38, 41, 44.

After the medical examination, a BOP Special Investigative Supervisory Lieutenant interviewed petitioner and a BOP psychologist was summoned to conduct an evaluation. J.A. 45. The psychologist interviewed petitioner at approximately 10:00 a.m. on March 5. *Ibid.* In her contemporaneous report, the psychologist noted that petitioner had alleged "a very similar incident" of

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<sup>3</sup> In 2012, BOP updated its policies governing the handling and investigation of allegations of sexual assault. See BOP, U.S. Dep't of Justice, *Program Statement No. 5324.09, Sexually Abusive Behavior Prevention and Intervention Program* (2012), [http://www.bop.gov/policy/progstat/5324\\_009.pdf](http://www.bop.gov/policy/progstat/5324_009.pdf); see also 77 Fed. Reg. 37,197-37,232 (2012) (promulgating regulations at 28 C.F.R. Pt. 115); cf. 42 U.S.C. 15607(a) and (b) (requiring Attorney General to publish a rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape that would apply to BOP).



sexual assault by three officers in July 2009 at USP Terre Haute; identified symptoms that normally would be expected "for someone like this inmate who has reported experiencing a previous similar trauma"; but concluded that petitioner "does not appear to display these symptoms." J.A. 46-47. "On the contrary," the psychologist explained, petitioner "exhibit[ed] a strong emotional reaction (anger)"; "d[id] not appear to have marked anxiety or noticeably increased arousal"; and "appear[ed] to have no difficulty discussing the [alleged] event in great detail" with clinical and investigative staff. J.A. 47.

As part of the initial investigation, petitioner signed an affidavit memorializing his allegations. J.A. 35-37. Among other things, petitioner's March 5 affidavit states that, after the alleged assault and while petitioner was still in the basement, petitioner observed the "same officers" escort Inmate #2 to the basement and "rough him up." J.A. 36.

c. BOP officials reported petitioner's allegations to the Department of Justice's Office of the Inspector General (OIG), which conducted its own independent investigation. J.A. 31. OIG interviewed petitioner, who repeated his allegations and identified Inmate #2 as a witness. *Ibid.* OIG interviewed Inmate #2, who "reported that he did not witness [Officer] Pealer or any other BOP employee assault [petitioner]." J.A. 32.

OIG interviewed Officer Pealer, who executed a sworn affidavit stating that he was familiar with petitioner because of his "numerous fights since his arrival" at USP Lewisburg; specifically denying petitioner's assault allegations; and stating that he did not recall dealing with petitioner the day of the March 4 search. J.A. 27-28, 32-33. OIG also interviewed several BOP officers

who participated in the March 4 search, including Lieutenant Edinger and Officers Wert and Gemberling, none of whom “reported seeing [Officer] Pealer or any other BOP employee use excessive force against [petitioner] or sexually assault him.” J.A. 32; see J.A. 33-34 (listing interview memoranda).

OIG determined that, unlike other incidents in which videotape evidence disproved petitioner’s allegations of officer misconduct (see p. 2 n.1, *supra*), no cameras monitored the basement holding-cell area at the time of the alleged assault in this case. J.A. 32; cf. J.A. 12 (petitioner’s complaint noting that “no video footage” captured his alleged assault). OIG noted petitioner’s “history of making allegations that he was sexually assaulted by BOP staff.” J.A. 32. Ultimately, OIG issued a report stating that its “investigation did not substantiate [petitioner’s] allegations.” *Ibid.*

2. In January 2011, petitioner filed this action under the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 1346(b), 2671-2680. J.A. 3. In his *pro se* complaint, petitioner “seeks to be transferred” out of USP Lewisburg and \$1.5 million in damages. J.A. 12.

a. Since its enactment in 1946, the FTCA has waived the United States’ sovereign immunity from suits seeking damages for “injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission” of an employee of the federal government, “while acting within the scope of his office or employment,” “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. 1346(b)(1); see FTCA, ch. 753, §§ 401-424, 60 Stat. 842-847. The Act, however, excepts 13 categories of claims from that waiver of sover-

eign immunity. 28 U.S.C. 2680. The FTCA, for instance, excepts from its provisions claims involving the exercise or performance of a discretionary function, 28 U.S.C. 2680(a), and, as a general matter, claims arising out of intentional torts, 28 U.S.C. 2680(h). The latter exception, known as the intentional-tort exception, provides that the FTCA “shall not apply” to “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract right.” *Ibid.*

In 1974, Congress amended the intentional-tort exception by adding a proviso that waived the United States’ sovereign immunity from certain claims arising out of six of the 11 torts listed in the exception. See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. More specifically, the proviso specifies “[t]hat, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 U.S.C. 2671 to 2680] and section 1346(b) of [Title 28] shall apply to any claim arising \* \* \* out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.” 28 U.S.C. 2680(h). The proviso adds that, “[f]or the purpose of [Section 2680(h)], ‘investigative or law enforcement officer’ means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” *Ibid.*

b. Petitioner alleges in his complaint that federal employees were negligent “in failing to exercise reasonable care to protect [him]” and that, “[a]s a result \* \* \* , [petitioner] suffered physical injury” when he was “sexually assaulted and battered.” J.A. 9; see J.A.

9-10 (alleging that petitioner's "injury was caused by federal employee's negligence"). The complaint adds that petitioner's claim that he "was sexually assaulted and battered maliciously with evil intent by [O]fficers Pealer, Edinger, and G[e]mberling" is "a claim of sexual assault and battery and neglig[en]ce." J.A. 12. Under petitioner's negligence theory, Officer Gemberling "owed [petitioner] a duty of care to protect [him] from the [alleged] sexual assault and battery of staff members Pe[a]ller and Edinger," but negligently breached that duty by standing "at the [basement] door" and doing "nothing or sa[y]ing anything to stop Edinger or Pe[a]ller." J.A. 60-61, 65-66; see J.A. 66 (arguing that FTCA liability exists "not for [the] intentional tort, but for [the] negligence that precipitated [it]"). Under his intentional-tort theory, petitioner further argued that his alleged assault is actionable as "torts of assault and battery or intentional infliction of emotional distress." J.A. 65.

The government moved to dismiss or, alternatively, for summary judgment (J.A. 50-58), arguing that petitioner's negligence allegation (J.A. 55-58) and intentional-tort allegation (J.A. 53-55) were insufficient to state viable claims under the FTCA. As relevant here, the government argued that the FTCA did not waive the United States' sovereign immunity from suit on petitioner's intentional-tort claim, because it fell within the intentional-tort exception in 28 U.S.C. 2680(h). J.A. 54-55. The government explained that Section 2680(h)'s law-enforcement proviso, which serves as an exception to the FTCA's intentional-tort exception, did not apply to this case under the Third Circuit's binding precedent in *Pooler v. United States*, 787 F.2d 868, 872, cert. denied, 479 U.S. 849 (1986), which interpreted the proviso



as applying only to tortious conduct by federal officers during the course of an arrest, a search, or a seizure of evidence. J.A. 54; see J.A. 84-85. The government stated that there is “no dispute that [the] correctional officers [here] are law enforcement officers” under the proviso and that “Officer Pe[a]ller was acting within the scope of his employment when the alleged assault occurred.” J.A. 54-55; see J.A. 84-85. But under *Pooler*, the government concluded, the law-enforcement proviso applies only when an officer’s alleged misconduct occurs “during the course of an arrest, search, or seizure” and, in this case, the alleged assault “did not involve an arrest, search, or seizure.” J.A. 54-55.

Petitioner responded by acknowledging that when an FTCA claim is premised on intentionally tortious conduct, the tort “has to be [committed] in the course of an arrest, search, and ‘seizure.’” J.A. 66 (citing *Pooler*, 787 F.2d at 872). But petitioner argued that *Pooler* did not preclude his claim, because “the most common type of seizure is an arrest which results in detention”; petitioner was allegedly “detained” when he was “forced to commit a sexual act”; and he therefore “was seized by [federal] employees” at the time of the alleged assault as required by *Pooler*. *Ibid*.

3. The district court granted summary judgment to the government. J.A. 89-97. First, the district court concluded that petitioner did not “state[] a negligence claim upon which relief can be granted,” because “it is clear that the alleged assault and battery was intentional.” J.A. 96-97. Second, the district court held that petitioner’s intentional-tort claim was not actionable, because it fell within the FTCA’s intentional-tort exception. J.A. 94-96. The court explained that the Third Circuit in *Pooler* had construed Section 2680(h)’s law-

enforcement proviso to permit suits based on an intentional tort by a federal law enforcement officer only when the officer “execut[es] a search, seiz[es] evidence, or mak[es] an arrest.” J.A. 94 (quoting *Pooler*, 787 F.2d at 872). And because a “seizure” is actionable under *Pooler*’s understanding of 28 U.S.C. 2680(h) only when it involves “the seizure of evidence,” the court rejected petitioner’s contention that the alleged “seizure” of his person was sufficient to make his intentional-tort claim actionable. J.A. 96.

4. The court of appeals ordered that the case be submitted to a panel for a determination whether a summary disposition without briefing by the parties would be appropriate. J.A. 99-100. The court then summarily affirmed without briefing in a nonprecedential decision. J.A. 101-104.

The court of appeals agreed with the district court that petitioner had failed to “state a negligence claim upon which relief could be granted,” because “it is clear that the alleged actions were intentional,” not negligent. J.A. 104 n.1 (emphasizing that petitioner alleged that he “was ‘sexually assaulted and battered maliciously with evil intent by [the three correctional] officers’” (quoting J.A. 12)). The court of appeals also agreed with the district court that petitioner had failed to show that his intentional-tort claim was actionable under *Pooler*. J.A. 103-104. The court explained that *Pooler* limits Section 2680(h)’s law-enforcement proviso to cases in which an investigative or law enforcement officer commits an intentional tort “while executing a search, seizing evidence, or making arrests.” J.A. 103 (citing *Pooler*, 787 F.2d at 872). The court thus concluded that petitioner’s claim that he himself was unconstitutionally “seized” was insufficient to fall within the proviso, because



"*Pooler* limits the term 'seizure' to the seizure of evidence." J.A. 105.

5. Petitioner filed a *pro se* petition for a writ of certiorari that presented two questions involving his "negligence claim." Pet. i, 9-10, 12. The government opposed certiorari on the ground that the court of appeals' disposition of that claim was correct and did not implicate a division of authority. Br. in Opp. 4-5. The government noted that although petitioner "has not challenged *Pooler*'s interpretation of the law-enforcement [proviso] to the intentional-tort exception in Section 2680(h)," the courts of appeals were divided on that issue. *Id.* at 6. The government therefore explained that that division of authority might "eventually warrant this Court's review" but that review was unwarranted in this case because the petition did not implicate it. *Ibid.*

This Court granted certiorari, limited to the following question as formulated by the Court:

Whether 28 U.S.C. 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of Federal law."

133 S. Ct. 98. By letter dated November 9, 2012, the United States subsequently informed the Court that it would not defend the judgment of the court of appeals with respect to that question.

#### SUMMARY OF ARGUMENT

The law-enforcement proviso to Section 2680(h) applies to claims arising out of the proviso's six listed intentional torts with regard to the wrongful acts or omis-

sions of an “investigative or law enforcement officer” while acting within the scope of his employment. The Third Circuit erred in concluding that the proviso applies only to such conduct by the officer while executing a search, seizing evidence, or making an arrest for a violation of federal law. The text of Section 2680(h), the statutory structure, and the legislative history unambiguously demonstrate that no such limitation exists.

The law-enforcement proviso in Section 2680(h) waives the United States’ sovereign immunity from specified intentional tort claims. The scope of that waiver must therefore be strictly construed in favor of immunity. With respect to the question presented, however, the scope of the proviso’s waiver of immunity unambiguously extends to acts or omissions by investigative or law enforcement officers while acting within the scope of their employment, whether or not they occur during a search, a seizure of evidence, or an arrest.

A. Four textual and structural features establish as much. First, the proviso’s text includes only three criteria defining its scope: (1) The tort claim must arise out of any of six listed intentional torts; (2) the claim must be based on the “acts or omissions” of a tortfeasor federal employee who qualifies as an “investigative or law enforcement officer”; and (3) the claim must satisfy the requirements for a valid FTCA claim under Sections 1346(b) and 2671 to 2680 of Title 28, including the requirement that the acts or omissions must be by an officer “while acting within the scope of his office or employment,” 28 U.S.C. 1346(b). Second, by applying the proviso to “acts or omissions” taken by an officer “while acting within the scope of his office or employment,” Congress defined the scope of the acts or omissions addressed by the proviso without further limiting them to

acts or omissions that occur “while” the officer executes a search, seizes evidence, or makes an arrest. Third, Section 2680(h)’s definition of “investigative or law enforcement officer” itself depends on whether the officer is “empowered by law” to execute searches, seize evidence, or make arrests, not on any particular exercise of that authority. And finally, the broader structure of Section 2680(h) demonstrates that, when Congress intends to exclude from the FTCA’s waiver of sovereign immunity certain categories of activities of federal employees, it does so by expressly specifying the activities that lie outside that waiver. Nothing in Section 2680(h)’s text or the broader statutory structure thus supports restricting the proviso to acts or omissions that occur during searches, seizures of evidence, or arrests.

B. The legislative history of the law-enforcement proviso confirms that reading. The report of the Senate committee that drafted the proviso’s text shows that the proviso was introduced in response to particular instances of egregious law-enforcement conduct involving searches and seizures by federal narcotics agents, but that it was drafted to apply beyond such circumstances. The committee was clear that the proviso would “apply to *any case* in which a Federal law enforcement agent committed the tort while acting within the scope of his employment” and would therefore “waive[] the defense of sovereign immunity” in “cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the [six torts listed in the proviso].” S. Rep. No. 588, 93d Cong., 1st Sess. 3-4 (1973) (emphasis added).

C. The Third Circuit’s analysis in *Pooler* does not withstand scrutiny. The court’s partial reliance on Section 2680(h)’s language cannot be squared with the text

itself, and its description of the proviso's legislative history is contradicted by the very source on which the court relied. Indeed, in the 26 years since the Third Circuit interpreted the law-enforcement proviso (without the benefit of briefing by the government on the issue), no other court of appeals has followed its lead.

D. Petitioner's intentional-tort claim falls within the scope of Section 2680(h)'s law-enforcement proviso and Section 1346(b)'s waiver of sovereign immunity. First, his claim for "assault" and "battery" invokes two of the intentional torts expressly listed in the proviso. Second, the government conceded below that the BOP officers in this case qualify as "investigative or law enforcement officers." And finally, the government conceded that Officer Pealer was acting within the scope of his employment at the time of the alleged tort. As a result, this case was not correctly resolved below based on *Pooler's* interpretation of Section 2680(h). A remand is therefore warranted for further proceedings on petitioner's intentional-tort claim.

### ARGUMENT

#### **THE WAIVER OF SOVEREIGN IMMUNITY IN THE LAW-ENFORCEMENT PROVISIO TO SECTION 2680(h) IS NOT LIMITED TO TORTIOUS CONDUCT THAT OCCURS DURING A SEARCH, A SEIZURE OF EVIDENCE, OR AN ARREST**

In 1974, Congress waived the United States' sovereign immunity from tort claims seeking damages for injuries caused by the wrongful acts or omissions of "investigative or law enforcement officers" of the United States Government while acting within the scope of their employment when those claims arise out of, *inter alia*, assault or battery. 28 U.S.C. 2680(h); see 28 U.S.C. 1346(b)(1). The court of appeals in this case applied its existing precedent in *Pooler v. United States*, 787 F.2d



868, 872 (3d Cir.), cert. denied, 479 U.S. 849 (1986), which held that the 1974 waiver of sovereign immunity in Section 2680(h) extends only to wrongful acts or omissions of “investigative or law enforcement officers” committed while such officers “execut[e] a search, seiz[e] evidence, or mak[e] arrests for violations of federal law.” J.A. 103. That is incorrect. The text of Section 2680(h), the statutory structure, and the legislative history demonstrate that the wrongful acts or omissions of an “investigative or law enforcement officer” acting within the scope of his employment can trigger FTCA liability of the United States for assault and battery, whether or not the officer’s tortious conduct occurs while he is executing a search, seizing evidence, or making an arrest.

**A. The Text And Statutory Context Of The Law-Enforcement Proviso Unambiguously Waive Immunity From Intentional-Tort Claims Based On Acts And Omissions Of Investigative Or Law Enforcement Officers Acting Within The Scope Of Their Employment**

When Congress passed the FTCA in 1946, it included in the Act an exception for intentional torts—now codified at 28 U.S.C. 2680(h)—that preserved the United States’ sovereign immunity from “[a]ny [tort] claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process,” or any of five other specified torts. 28 U.S.C. 2680(h) (1970); see FTCA, ch. 753, § 421(h), 60 Stat. 846. For nearly three decades, that statutory preservation of immunity fully “protect[ed] the Federal Government from liability when its agents commit[ted] intentional torts.” *United States v. Shearer*, 473 U.S. 52, 56 (1985) (plurality opinion) (quoting S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973)) (brackets in original). In 1974, however, Con-

gress passed new legislation that for the first time “waive[d] sovereign immunity for [certain] claims arising out of the intentional torts of law enforcement officers.” *Ibid.*

The 1974 legislation amended Section 2680(h) by adding what is known as the law-enforcement proviso. See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. Notwithstanding the FTCA’s preservation of sovereign immunity for matters covered by Section 2680(h)’s intentional-tort exception, the proviso effectuates a limited waiver of that immunity by specifying that, “with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [28 U.S.C. 2671 to 2680] and section 1346(b) of [Title 28] shall apply to any claim arising \* \* \* out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.” 28 U.S.C. 2680(h).

1. This Court has long held that “any ambiguities in the scope of a waiver” of sovereign immunity must be strictly “construed in favor of immunity,” because the reach of such statutory waivers “must be ‘unequivocally expressed’ in statutory text.” *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (citations omitted); *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lane v. Pena*, 518 U.S. 187, 192 (1996); cf. *Dolan v. USPS*, 546 U.S. 481, 491 (2006) (recognizing this “general rule” of “strictly constru[ing]” the scope of statutory waivers of immunity) (citation omitted). A strict construction of the limited waiver of sovereign immunity in Section 2680(h)’s law-enforcement proviso is necessary to ensure that “the Government’s consent to be sued is n[ot]



enlarged beyond what a fair reading of the text requires.” *Cooper*, 132 S. Ct. at 1448.<sup>4</sup>

In this case, with respect to the question presented, the scope of the proviso’s limited immunity waiver is “clearly discernable from the statutory text in light of traditional interpretive tools.” *Cooper*, 132 S. Ct. at 1448. The text of that proviso and the broader structure of the FTCA unambiguously establish that Congress waived sovereign immunity from claims (1) arising out of the proviso’s six listed intentional torts (2) with regard to the “acts or omissions” of employees of the United States who qualify as “investigative or law enforcement officers” (28 U.S.C. 2680(h)) when (3) they are “acting within the scope of [their] \* \* \* employment” (28

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<sup>4</sup> This Court has determined that the interpretive canon requiring strict construction of the scope of statutory waivers of sovereign immunity does not apply when “constru[ing] one of the subsections of 28 U.S.C. § 2680,” in those contexts in which “unduly generous interpretations of the [FTCA’s] exceptions [would] run the risk of defeating the central purpose of the [FTCA],” which “waives the Government’s immunity from suit in sweeping language.” *Dolan*, 546 U.S. at 491-492 (quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984), and *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)). That interpretive principle, however, does not apply where, as here, the Court is not asked to evaluate the scope of an original FTCA exception in Section 2680. In this case, there is no risk of “defeating the central purpose” of the FTCA as reflected in its “sweeping language” (*ibid.*), because the Congress that enacted the FTCA expressly *preserved* immunity from intentional-tort claims, see *Shearer*, 473 U.S. at 56 (plurality opinion). The analytically distinct question now before the Court is the proper scope of the law-enforcement proviso, which a different Congress passed in 1974 legislation that for the first time “waive[d] sovereign immunity for [certain] claims arising out of the intentional torts of law enforcement officers,” *ibid.* The text of that later enactment must be judged on its own terms and, like any normal waiver of sovereign immunity, must be strictly construed in favor of the sovereign.

U.S.C. 1346(b)), not just when they execute a search, seize evidence, or make an arrest.

2. The text of the law-enforcement proviso and the broader structure of the FTCA are unambiguous with respect to the question presented. In particular, four textual and structural features make clear that Congress did not, as the Third Circuit has held, limit the law-enforcement proviso's waiver of sovereign immunity to acts or omissions occurring in the course of executing a search, seizing evidence, or making an arrest.

First, Congress applied the proviso's waiver of immunity to the acts or omissions of federal "investigative or law enforcement officers" by specifying that, "with regard to [the] acts or omissions" of such officers, "the provisions of this chapter [28 U.S.C. 2671 to 2680] and section 1346(b)" shall apply to "any claim" arising out of any one of six specified intentional torts. 28 U.S.C. 2680(h). That text includes only three criteria to trigger the proviso's waiver of immunity: (a) The tort claim must arise out of any of the six listed intentional torts; (b) the claim must be based on the "acts or omissions" of a tortfeasor federal employee who qualifies as an "investigative or law enforcement officer"; and (c) the claim must also satisfy the requirements for a valid FTCA claim under Sections 1346(b) and 2671 to 2680 of Title 28. Nothing in the statutory text suggests any further limitation on the types of "acts or omissions" triggering FTCA liability.

Second, Congress's direction that "[S]ection 1346(b) \* \* \* shall apply" to the tort claims identified by the law-enforcement proviso to 28 U.S.C. 2680(h) underscores that the proviso applies to the "acts or omissions" of investigative or law enforcement officers whenever the officers are acting within the scope of their employ-

ment. Section 1346(b) expressly limits the types of “act[s] or omission[s]” governed by the FTCA’s waiver of sovereign immunity by conferring jurisdiction over certain tort “claims against the United States” for “injury \* \* \* caused by the negligent or wrongful *act or omission* of any employee of the Government *while acting within the scope of his office or employment*.” 28 U.S.C. 1346(b) (emphasis added). Although that waiver of sovereign immunity does not generally extend to the claims covered by the Act’s intentional-tort exception, see 28 U.S.C. 2680(h), Congress’s 1974 enactment of the law-enforcement proviso to that exception expressly extended Section 1346(b)’s waiver to six intentional-tort claims “with regard to acts or omissions of investigative or law enforcement officers.” *Ibid.* In other words, for claims arising out of any of the six enumerated intentional torts, the proviso makes actionable the “acts or omissions” of federal investigative or law enforcement officers “while acting within the scope of [their] office or employment” but does not further limit the category of “acts or omissions” triggering FTCA liability.

Had Congress intended to restrict further the liability-triggering acts or omissions of investigative or law enforcement officers acting within the scope of their employment to just those that occur during searches, seizures of evidence, or arrests, it would have provided some limiting text to that effect. Indeed, the fact that the law-enforcement proviso incorporates Section 1346(b)’s textual restriction on actionable “acts or omissions” of federal employees—a restriction limiting the acts or omissions to those that occur “while [such employees are] acting within the scope of [their] office or employment”—shows that the proviso was intended to reach the specified torts arising out of *all* such acts or

omissions of investigative or law enforcement officers acting within the scope of their employment. Cf. *Dean v. United States*, 556 U.S. 568, 573 (2009) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Third, the definition of “investigative or law enforcement officers” in Section 2680(h) focuses on officers’ status, not the types of actions in which they engage at the time of the acts or omissions that give rise to a tort claim. Congress specified that the term “‘investigative or law enforcement officer’ means any officer of the United States who is *empowered by law* to execute searches, to seize evidence, or to make arrests for violations of Federal law.” 28 U.S.C. 2680(h) (emphasis added). The immunity determination depends on a federal officer’s legal authority to execute searches, seize evidence, or make arrests, not on any particular exercise of that power. An officer “empowered” with such authority “by law” thus remains an “investigative or law enforcement officer” under Section 2680(h) even when he is not actually performing one of those three functions, so long as the conduct is within the scope of his employment as an investigative or law enforcement officer. For that reason, the law-enforcement proviso’s application to “acts or omissions of investigative or law enforcement officers,” *ibid.*, does not turn on whether the officers are actually conducting a search, seizing evidence, or making an arrest at the time of the act or omission giving rise to an intentional-tort claim.



Finally, the broader structure of Section 2680 demonstrates that, when Congress intended to limit the FTCA's waiver of sovereign immunity to exclude certain categories of activities of federal employees, Congress used statutory text that—unlike the law-enforcement proviso—expressly identifies the activities falling outside of the waiver. Congress, for instance, excluded certain tort claims “based upon an act or omission of an employee of the Government \* \* \* in the execution of a statute or regulation,” 28 U.S.C. 2680(a); claims based on “the exercise or performance \* \* \* [of] a discretionary function or duty,” *ibid.*; and claims “arising out of the loss, miscarriage, or negligent transmission of letters or postal matter,” 28 U.S.C. 2680(b). Congress similarly preserved immunity for claims “arising in respect of \* \* \* the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.” 28 U.S.C. 2680(c); see *Ali v. BOP*, 552 U.S. 214, 217-221 (2008). In contrast, Section 2680(h)'s law-enforcement proviso contains no text narrowing the types of “acts or omissions” by law enforcement officers that fall within its scope. Congress instead used text that turns on the status of the employees as “investigative or law enforcement officers” and subjects the United States to suit for the “acts or omissions of [such] investigative or law enforcement officers,” 28 U.S.C. 2680(h), so long as their acts or omissions occur “while acting within the scope of [their] office or employment,” 28 U.S.C. 1346(b).

In short, the waiver of sovereign immunity unambiguously expressed in Section 2680(h)'s statutory text and the structure of the FTCA is not limited to intentional-tort claims based on federal officers' acts or omissions during searches, seizures of evidence, or arrests.

### B. The Legislative History Confirms The Scope Of The Proviso's Unambiguous Text

This Court has repeatedly held that “[l]egislative history cannot supply a waiver [of sovereign immunity] that is not clearly evident from the language of the statut[ory text].” *Cooper*, 132 S. Ct. at 1448 (citing *Lane*, 518 U.S. at 192); see *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992). Such extrinsic guides to congressional intent normally become relevant only when the statutory text is itself ambiguous. But, in the sovereign-immunity context, if there is a “plausible” reading of the text that does not waive immunity in the circumstances at issue, the statutory text does not “unambiguous[ly]” waive immunity and thus cannot properly be construed to do so. *Id.* at 37 (“[L]egislative history has no bearing on the ambiguity point.”); see *Cooper*, 132 S. Ct. at 1448, 1453, 1455 n.12.

A sufficiently clear expression of congressional intent to *preserve* immunity that is plainly expressed in the legislative history may nevertheless be relevant in contexts in which the statutory text standing alone might initially be viewed as effectuating a waiver of sovereign immunity. The Court need not address that possibility in this case, however, because the law-enforcement proviso’s legislative history confirms that Congress did not limit the proviso’s waiver of immunity to the acts or omissions of investigative or law enforcement officers during searches, seizures of evidence, or arrests. Indeed, that history shows that although Congress sought to waive immunity from intentional-tort claims arising from searches, seizures of evidence, and arrests, it specifically designed the proviso to extend beyond those contexts.



The law-enforcement proviso originated in the Senate in 1973 as a response to warrantless and unlawful no-knock raids by federal narcotics agents who mistakenly targeted the homes of several innocent individuals. See S. Rep. No. 588, 93d Cong., 1st Sess. 2-3 (1973) (*Senate Report*). The most notorious of those raids occurred in April 1973 in Collinsville, Illinois, *id.* at 2, when groups of federal narcotics agents forcibly entered the homes of two innocent families without arrest or search warrants in misguided pursuit of suspects in an alleged cocaine-distribution ring. *Reorganization Plan No. 2 of 1973: Hearings Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Gov't Operations, Pt. 3*, 93d Cong., 1st Sess. 446, 549-550 (1973); see *id.* at 461-475 (family's testimony that armed agents entered their home at night without warning, handcuffed them, searched for evidence, and subjected them to abusive treatment).

In response to that egregious conduct, a Senate committee drafted the law-enforcement proviso as an amendment to a bill that had already passed the House, see *Senate Report 2*, and Congress subsequently passed the proviso with the committee's text. See 120 Cong. Rec. 5285, 5290 (1974); 119 Cong. Rec. 38,968-38,969 (1973). The committee explained that the proviso would make the "Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* [v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),]" and thus would give a monetary remedy to "innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois," *i.e.*, individuals injured during the course of unlawful "search[es] and seizures" within their own homes. *Senate Report 3-4*. The Committee

emphasized, however, that the proviso “should not be viewed as limited to constitutional tort situations,” but rather would “apply to *any case* in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.” *Id.* at 4 (emphasis added). The Committee thus explained that the proviso would “waive[] the defense of sovereign immunity” in “cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process.” *Id.* at 3.

That legislative understanding of the proviso directly parallels the unambiguous scope of the proviso’s text. Both confirm that Congress waived the United States’ sovereign immunity from intentional-tort claims based on the “acts or omissions” of investigative or law enforcement officers acting within the scope of their employment, regardless whether those acts or omissions occur during searches, seizures of evidence, or arrests.

**C. The Third Circuit’s Reading Of The Law-Enforcement Proviso Cannot Be Reconciled With The Statutory Text And Structure Or With The Proviso’s Legislative History**

The Third Circuit’s reading of the law-enforcement proviso, which the court of appeals developed in its 1986 decision in *Pooler*, cannot be reconciled with the text of Section 2680(h), the statutory structure, or the legislative history. Since *Pooler*, all other courts of appeals to have addressed the question have properly declined to adopt the Third Circuit’s view that the proviso applies only when investigative or law enforcement officers commit intentional torts while conducting a search, seizing evidence, or making an arrest.

In *Pooler*, the plaintiffs alleged that they were unlawfully arrested and prosecuted for selling marijuana on the premises of a Veterans Administration (VA) hospital, because a VA police officer based his investigation of them on an informant who they claimed was unreliable and submitted the charges to state prosecutors without disclosing the alleged deficiencies in his investigative methods. 787 F.2d at 869. The Third Circuit concluded that the VA officer's investigative methods and decision to file complaints with state authorities fell within the FTCA's discretionary-function exception in Section 2680(a). *Id.* at 870-871. The plaintiffs, however, additionally argued on appeal that the discretionary-function exception did not apply to claims falling within Section 2680(h)'s law-enforcement proviso, *id.* at 872. The government, in turn, took the position that the district court had properly rejected that contention. See Gov't Br. at 19-23, *Pooler*, *supra* (No. 85-1335), available at 1985 WL 1167182.

Rather than decide the appeal as briefed by the parties, the panel majority declined to resolve "the interrelationship between the discretionary function exception and the intentional tort proviso." *Pooler*, 787 F.2d at 872.<sup>5</sup> The majority instead held (without the benefit of

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<sup>5</sup> Most courts of appeals that have addressed the question have concluded that Section 2680(h)'s law-enforcement proviso does not narrow the scope of Section 2680(a)'s discretionary-function exception to the FTCA's waiver of immunity. See *Medina v. United States*, 259 F.3d 220, 225-226 (4th Cir. 2001) (concluding that the two provisions "exist independently" and that Section 2680(h)'s proviso does not "overr[i]de" the discretionary-function exception); *Gasho v. United States*, 39 F.3d 1420, 1433, 1435 (9th Cir. 1994) (discretionary-function exception will apply "even if the discretionary act constitutes an intentional tort" subject to Section 2680(h)'s intentional-tort proviso), cert. denied, 515 U.S. 1144 (1995); *Gray v. Bell*, 712 F.2d 490, 507-

briefing on the issue by the government) that the law-enforcement proviso did not apply to the plaintiffs' claims, because, in the majority's view, the proviso applies only to intentional-tort claims in which federal investigative or law enforcement officers are "executing a search, seizing evidence, or making an arrest." *Ibid.*

The *Pooler* majority appears to have reached that conclusion in light of Section 2680(h)'s definition of "investigative or law enforcement officer," which defines the term to mean any officer of the United States who is "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 787 F.2d at 872 (quoting 28 U.S.C. 2680(h)). The majority explained that it read the proviso "as addressing the problem of intentionally tortious conduct occurring in the course of *the* specified government activities" in the definition, because those particular activities place government agents "most directly in contact with members of the public" and "thereby expos[e] the public to a risk that intentionally tortious conduct may occur." *Ibid.* (emphasis added). The majority stated that its conclusion that "Congress intended to deal only with conduct in the course of a search, a seizure, or an arrest" was "confirmed" by legislative history indicating that Congress enacted the proviso to provide a remedy "in situations where law enforcement officers conduct 'no-knock'

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508 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984); cf. *United States v. Morrow*, 266 U.S. 531, 535 (1925) ("[T]he presumption is that, in accordance with its primary purpose, [a proviso] refers only to the provision to which it is attached."). But see *Nguyen v. United States*, 556 F.3d 1244, 1252-1257 (11th Cir. 2009); *Denson v. United States*, 574 F.3d 1318, 1337 n.55 (11th Cir. 2009) (suggesting that *Nguyen's* discretionary-function holding may apply only in contexts in which federal law enforcement officers violate the Constitution), cert. denied, 130 S. Ct. 3384 (2010).



raids or otherwise violate the [F]ourth [A]mendment.” *Ibid.* (citing *Senate Report* 2-3). Judge Seitz concurred in the result but emphasized his disagreement with the majority’s view that Congress intended the law-enforcement proviso “to be limited in scope to the types of behavior that provided the initial motivation for its passage.” *Id.* at 874.

*Pooler*’s reading cannot be reconciled with the statute or its legislative history. Nothing in the text of the statute limits the proviso to intentional torts of federal officers occurring during a search, a seizure of evidence, or an arrest. To the contrary, as explained above, the statutory text applies to the “acts or omissions” of federal “investigatory or law enforcement officers” acting within the scope of their employment, without limiting those “acts or omissions” to those that occur during a search, a seizure, or an arrest. The proviso’s definition of “investigatory or law enforcement officers,” moreover, turns simply on the legal authority of those officers to execute searches, seize evidence, or make arrests, not on their actual exercise of that authority at the time of the alleged tort. See pp. 19-21, *supra*. And notwithstanding the *Pooler* majority’s view that the proviso’s legislative history reflects a congressional intent to “deal *only* with conduct” during searches, seizures, or arrests, 787 F.2d at 872 (emphasis added), the Senate Report on which the majority relied contradicts that conclusion. See p. 22, *supra*. The report specifically emphasizes that the proviso “should not be viewed as limited” to the situations that motivated its adoption but rather extends to “any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment.” *Senate Report* 4.

No other court of appeals has adopted *Pooler*'s interpretation of the law-enforcement proviso. The Seventh Circuit, in expressly rejecting *Pooler*'s holding, recognized that *Pooler*'s analysis has been repeatedly criticized as lacking "any principled underpinning." *Reynolds v. United States*, 549 F.3d 1108, 1114 (2008) (observing that the government "opted not to contest" the argument that the district court erred in adopting *Pooler*'s interpretation of Section 2680(h)). The Fourth Circuit likewise rejected *Pooler*'s interpretation as inconsistent with Section 2680(h)'s "unambiguous" text. *Ignacio v. United States*, 674 F.3d 252, 255 (2012); cf. Gov't Br. at 13-14, *Ignacio*, *supra* (No. 10-2149) (arguing that the court of appeals "need not read the proviso [as] narrowly" as *Pooler* to accept the government's position), available at 2011 WL 568765. And although the Ninth Circuit has construed the proviso to "apply only when [a] federal official acts in his or her investigative or law enforcement capacity," *Orsay v. DOJ*, 289 F.3d 1125, 1133 (2002) (quoting *Arnsberg v. United States*, 757 F.2d 971, 978 n.5 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986)), that reading, unlike *Pooler*'s, does not limit the proviso only to those acts or omissions occurring in the course of conducting searches, seizing evidence, or making arrests. See *id.* at 1133-1136 (holding that the proviso did not waive sovereign immunity from assault claim where law enforcement officer was acting in a supervisory capacity at the time of the alleged tort and not in an investigative or law-enforcement capacity).

**D. The Law-Enforcement Proviso Waives Sovereign Immunity From Petitioner's Assault And Battery Claim In This Case**

Although the government relied on *Pooler* as binding circuit precedent in litigation before the district court in



this case, see pp. 9-10, *supra*, for the reasons above, the government concludes that *Pooler*'s interpretation of Section 2680(h) is erroneous. The law-enforcement proviso applies the FTCA's provisions to (1) any claim arising out of assault, battery, or four other intentional torts (2) with respect to the "acts or omissions" of "investigative or law enforcement officers" who are acting within the scope of their employment. 28 U.S.C. 2680(h); see pp. 15-22, *supra*. Petitioner's intentional-tort claim falls within the scope of that proviso and Section 1346(b)'s waiver of sovereign immunity.

1. Petitioner's intentional-tort claim rests on his contention that BOP correctional officers committed the state-law torts of assault and battery by sexually assaulting and strangling him in the basement of USP Lewisburg. See J.A. 11-12.<sup>6</sup> Both "assault" and "battery" claims are expressly contemplated by the law enforcement proviso. 28 U.S.C. 2680(h). Moreover, the United States conceded in district court that the BOP officers who allegedly assaulted petitioner qualify as "law enforcement officers" under Section 2680(h) and that Officer Pealer "was acting within the scope of his employment when the alleged assault occurred." J.A. 54-55; see J.A. 84-85. Petitioner's allegations thus fall within the scope of Section 2680(h)'s law-enforcement proviso.

2. In light of the United States' concession below that the BOP officers in this case qualify as "investiga-

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<sup>6</sup> Petitioner timely filed an administrative FTCA claim for the alleged assault and battery and exhausted his administrative remedies before timely filing this FTCA action in January 2011. See 28 U.S.C. 2401(b), 2675(a); see also Dist. Ct. Doc. 1, at 11, 13 (BOP determination dated December 29, 2010, denying petitioner's administrative FTCA claim received July 8, 2010).

tive or law enforcement officers,” this case does not present an occasion to interpret Section 2680(h)’s definition of that term. We note, however, that in the government’s view, the term is limited to federal agents who are authorized by law to conduct the traditional law-enforcement functions of executing law-enforcement searches (often pursuant to a warrant), seizing evidence of a criminal offense, or making arrests for violations of federal criminal law. BOP correctional officers satisfy the definition because they are empowered by law, *inter alia*, to make arrests for federal criminal offenses. 18 U.S.C. 3050; 28 C.F.R. 511.18.

Other federal employees who conduct inspections and non-evidentiary seizures of a regulatory or administrative nature outside of traditional law-enforcement contexts are not properly included within Section 2680(h)’s definition of “investigative or law enforcement officers,” which must be strictly construed in favor of immunity. See pp. 17-18 & n.4, *supra* (discussing sovereign immunity canon); see, e.g., *Matsko v. United States*, 372 F.3d 556, 560 (3d Cir. 2004) (holding that “employees of administrative agencies, no matter what investigative conduct they are involved in, do not come within the § 2680(h) exception”); *EEOC v. First Nat’l Bank*, 614 F.2d 1004, 1007-1008 (5th Cir. 1980) (EEOC agents authorized to investigate civil employment-discrimination claims are not investigative or law enforcement officers), cert. denied, 450 U.S. 917 (1981); *Weinraub v. United States*, No. 5:11-cv-651, 2012 WL 3308950, at \*5-\*7 (E.D.N.C. Aug. 13, 2012) (agreeing with the majority of district courts to have addressed the issue that airport security screeners employed by the Transportation Security Administration are not investigative or law enforcement officers). A broader reading of that statutory

definition would incorrectly sweep within its scope federal employees whose positions would not fall within the natural meaning of “investigative or law enforcement officers” and who Congress never contemplated would be covered by that statutory term. Cf. *Arnsberg*, 757 F.2d at 978 n.5 (dicta noting argument that federal judges and magistrates might be “investigative or law enforcement officers” because 18 U.S.C. 3041 authorizes them to make arrests by issuing warrants); cf. also *New Jersey v. T.L.O.*, 469 U.S. 325, 341 n.7 (1985) (contrasting searches conducted by school officials with searches conducted for law-enforcement agencies). The meaning of “investigative or law enforcement officer,” as noted, is not a question properly before this Court.

In short, this case was not correctly resolved below based on *Pooler*’s interpretation of Section 2680(h). A remand is therefore warranted to permit further proceedings on petitioner’s intentional-tort claim.

#### CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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NOVEMBER 2012

## APPENDIX

### 1. 28 U.S.C. 1346(b) provides:

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

### 2. 28 U.S.C. 2401(b) provides:

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

3. 28 U.S.C. 2671 provides:

### **Definitions**

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.



4. 28 U.S.C. 2674 provides in pertinent part:

### **Liability of United States**

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

\* \* \* \* \*

5. 28 U.S.C. 2680 provides:

### **Exceptions**

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the



execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

- (k) Any claim arising in a foreign country.
- (l) Any claim arising from the activities of the Tennessee Valley Authority.
- (m) Any claim arising from the activities of the Panama Canal Company.
- (n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

6. Section 2 of the Act of March 16, 1974, Pub. L. No. 93-253, 88 Stat. 50, provides:

SEC. 2. Section 2680(h) of title 28, United States Code, is amended by striking out the period at the end thereof and inserting in lieu thereof a colon and the following: "*Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.*".

# **REPLY BRIEF**

No. 11-10362

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**In the Supreme Court of the United States**

---

KIM MILLBROOK, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

---

**REPLY BRIEF OF PETITIONER**

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Neither the United States nor the Court-appointed amicus ("Amicus") is willing to defend *Pooler's* idiosyncratic reading of the law enforcement proviso, which would limit the government's waiver of sovereign immunity to conduct occurring in the course of a search, seizure, or arrest. Instead, Amicus argues that the proviso should apply "only when the tortfeasor acts in an investigative or law-enforcement *capacity*." Amicus Br. 5 (emphasis in original).

This reading, while broader than *Pooler*,<sup>1</sup> is equally unmoored from the text. Indeed, Amicus admits that its construction would require this Court to add words to the statute, effectively changing the phrase "acts or omissions of an investigative or law enforcement officer" to "acts or omissions of an investigative or law enforcement officer *acting as such*." *Id.* at 10 (emphasis added). The Court should reject this invitation to judicial legislation, which is supported by neither the statutory text, nor the legislative history, nor common sense.

## **I. Sovereign Immunity Principles Do Not Support Amicus's Interpretation Of The Statute.**

1. The FTCA "waives the Government's immunity from suit in sweeping language." *Dolan v. Postal Serv.*, 546 U.S. 481, 492 (2006) (citation omitted). As a consequence, the interpretation of an FTCA exception does "not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed

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<sup>1</sup> Amicus does not define what he means by "investigative or law-enforcement capacity," other than to opine that it includes searches, seizures, arrests, "and closely related exercises of investigative or law-enforcement authority." Amicus Br. 5. It would presumably be up to the federal courts to fill this empty vessel.



\*\*\* in favor of the sovereign.' " *Ibid.* (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

Amicus argues that the *Dolan* principle does not apply here because "there is no occasion to construe any FTCA exception in this case." Amicus Br. 44. Not true. The law enforcement proviso is, both textually and structurally, part and parcel of the intentional-tort exception codified at 28 U.S.C. § 2680(h). When the proviso was enacted in 1974, its sole effect was to modify the scope of the exception. It is a basic principle of statutory interpretation that "[a] statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there." *Blair v. City of Chicago*, 201 U.S. 400, 446 (1906) (citation omitted); see also *Natural Resources Defense Council v. EPA*, 656 F.2d 768, 781 (D.C. Cir. 1981). And when Congress amended the intentional-tort exception, it was already well established that the scope of such exceptions would be construed in accordance with ordinary rules of statutory construction, rather than strictly in favor of the government. See, e.g., *Dalehite v. United States*, 346 U.S. 15, 31 (1953); *United States v. Yellow Cab Co.*, 340 U.S. 543, 547-549 (1951).

Because the law enforcement proviso is an integral part of the intentional-tort exception, any interpretation of the proviso's scope necessarily requires an interpretation of the exception's scope. Since "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute," the proper approach is to "identify 'those circumstances that are within the words and reason of the exception'—no less and no more." *Dolan*, 546 U.S. at 492 (quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984)). In construing the scope of law enforcement proviso—and, consequently, of the intentional-tort exception—there is no warrant for

this Court to place its thumb on one end of the interpretative scale.

2. Even if this Court were to disregard *Dolan* and apply a rule of strict construction, it would not change the result. To give effect to a waiver of sovereign immunity, the Court need only find that “the scope of Congress’ waiver [is] clearly discernable from the statutory text in light of traditional interpretive tools.” *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012). It is only when “[i]t is not” that the Court “take[s] the interpretation most favorable to the Government.” *Ibid.*

Here, petitioner’s interpretation of § 2680(h) is not just “clearly discernible” from the statutory text, it is the only interpretation consistent with a plain reading of that text. As the government acknowledges, “[t]he text of that proviso and the broader structure of the FTCA unambiguously establish” that the United States waived sovereign immunity for *any* enumerated tort committed by an investigative or law enforcement officer within the scope of his or her employment. Government Br. at 18–19. “There is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe.” *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008).

## **II. The Law Enforcement Proviso’s Scope Is Not Limited To Torts Committed By A Federal Officer While Acting In A Law Enforcement Capacity.**

Amicus admits that the “law enforcement capacity” limitation it urges is not explicitly set forth in the text of § 2680(h). Instead, it urges the Court to *imply* the restriction, arguing that “statements referring to persons by their status are often implicitly limited to situations where the person acts in their relevant capacity.” Amicus Br. 5. The Court should reject that argument.

**A. The statutory text does not support the implied law enforcement capacity requirement.**

1. Section 2680(h) is clear not only in what it says, but also in what it does not say: It doesn't require that the conduct covered by the law enforcement proviso be undertaken in a "law enforcement capacity." But it is not silent as to the capacity in which a tortfeasor must act in order to waive sovereign immunity: It specifies that the provisions of § 1346(b) shall apply to such tort claims. Section 1346(b), in turn, restricts the waiver to injuries caused by government employees "while acting within the scope of [their] office or employment." 28 U.S.C. § 1346(b). Congress thus extended the waiver to any of the enumerated torts committed within the scope of an officer's employment—not just to torts committed while acting in a law enforcement capacity.

"Statutory definitions control the meaning of statutory words," *Burgess v. United States*, 553 U.S. 124, 129 (2008) (citation and internal quotation marks omitted), and "[i]t is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term," *Meese v. Keene*, 481 U.S. 465, 484 (1987). Thus, "[a]s a rule, a definition which declares what a term 'means' \* \* \* excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (omission in original, alteration and internal quotation marks omitted).

Here, Congress expressly and unambiguously addressed the capacity in which a law enforcement officer must act in order to waive sovereign immunity. It limited the waiver to conduct occurring within the scope of employment, but imposed no further restriction. Nothing in the statute's text supports the additional "law enforcement capacity" requirement that Amicus seeks to engraft onto the law.

2. Amicus next appeals to “common usage,” arguing that “courts often read statutory references to a role or status as limited to actions taken in the relevant capacity, even when the literal statutory text could be read to extend more broadly.” Amicus Br. 11. He relies primarily on *Pegram v. Hedrich*, 530 U.S. 211 (2000), an ERISA case construing the term “fiduciary.” But the holding in *Pegram* was based on express statutory language that has no counterpart in the law enforcement proviso.

Section 2680(h) provides that “‘investigative or law enforcement officer’ means any officer of the United States who is *empowered by law*” to carry out searches, seizures, or arrests. 28 U.S.C. § 2680(h) (emphasis added). This definition, by its terms, hinges on the officer’s *legal authority* to carry such activities, and not on whether that power is being exercised at any particular time.

In contrast, the ERISA provision at issue in *Pegram* expressly ties the definition of “fiduciary” to specific conduct, by providing that “a person is a fiduciary with respect to a plan *to the extent*” that he or she (among other things) “*exercises* any discretionary authority or discretionary control respecting management of such plan or *exercises* any authority or control respecting management or disposition of its assets.” 29 U.S.C. § 1002(21)(a)(i) (emphasis added). *Pegram* relied heavily on this language in construing the scope of the term “fiduciary”:

“[T]he statute does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only ‘to the extent’ that he acts in such a capacity in relation to a plan. In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether \* \* \* that person was acting



as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.”

*Pegram*, 530 U.S. at 225–226 (2000) (citation omitted). However, *Pegram* expressly reserved judgment as to whether the mere possession of discretionary authority to administer a plan could be enough, in itself, to qualify a person as a fiduciary:

“Although we are not presented with the issue here, it could be argued that Carle is a fiduciary insofar as it has discretionary authority to administer the plan, and so it is obligated to disclose characteristics of the plan and of those who provide services to the plan.”

*Id.* at 227 n.8. The law enforcement proviso, unlike ERISA’s definition of a fiduciary, does not expressly tie coverage to the “exercis[e]” of law enforcement—or any other—authority. To the contrary, the proviso’s only language regarding the capacity in which the officer must act refers back to § 1346(b), which requires only that the actions take place in the course of employment. And *Pegram* itself recognizes that the mere possession of legal authority may be enough to bring a person within the scope of a statute, where the text so provides. That is precisely the case here.

3. More instructive than *Pegram* is *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008), which construed the meaning of the term “law enforcement office” as used in § 2680(c) of the FTCA, which excepts from the waiver of sovereign immunity “[a]ny claim arising in respect of \* \* \* the detention of any \* \* \* property by any officer of customs or excise or any other law enforcement officer.” 28 U.S.C. § 2680(c). The petitioner in *Ali* urged the Court to exclude prison officials from the exception’s scope, arguing that the statutory phrase “any other law enforce-

ment officer' includes only law enforcement officers acting in a customs or excise capacity." *Ali*, 552 U.S. at 218. The Court rejected this conduct-based interpretation as inconsistent with the plain language of the statute:

"The phrase 'any other law enforcement officer' suggests a broad meaning. \* \* \* In the end, we are unpersuaded by petitioner's attempt to create ambiguity where the statute's text and structure suggest none. Had Congress intended to limit § 2680(c)'s reach as petitioner contends, it easily could have written 'any other law enforcement officer *acting in a customs or excise capacity*.' Instead, it used the unmodified, all-encompassing phrase 'any other law enforcement officer.' Nothing in the statutory context requires a narrowing construction—indeed, as we have explained, the statute is most consistent and coherent when 'any other law enforcement officer' is read to mean what it literally says."

*Id.* at 218–219, 227–228 (citations omitted; emphasis in original). The same reasoning controls here. Had Congress intended to limit the scope of § 2680(c)'s waiver, it easily could have confined it to claims arising from the "acts or omissions of an investigative or law enforcement officer *acting as such*." Cf. Amicus Br. 10. Instead, it extended the waiver to "any claim" arising out of one of the enumerated torts "with regard to acts or omissions of investigative or law enforcement officers." 28 U.S.C. § 2680(h). As in *Ali*, nothing in these words requires a narrowing construction; the most coherent reading both provisions' language is the literal one. See also, e.g., *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (refusing to construe "any \* \* \* term of imprisonment" to mean any *federal* term of imprisonment); see *Maine v. Thiboutot*, 448 U.S. 1, 4, 6 (1980) (refusing to read the term "laws" in 42 U.S.C.



§ 1983 to be limited to “civil rights or equal protection laws”).

**B. “Common sense” does not support the implied law enforcement capacity requirement.**

1. Finding little support for his position in the statutory language, Amicus spends much of his brief arguing that “common sense” compels his atextual, conduct-based reading. Specifically, he argues that the “law enforcement capacity” requirement would prevent “at least two types of anomalies that Congress could not have intended.” Amicus Br. 13.

Amicus’s appeal to “common sense” is, at its core, a request that this Court adopt policy judgments that Amicus considers wise, but that were never enacted by Congress. The problem with this reasoning is that it requires the Court to legislate, not interpret. Even “if the literal text of the statute produces a result that is, arguably, somewhat anomalous[,] we are not simply free to ignore unambiguous language because we can imagine a preferable version.” *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000), *aff’d sub nom. Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2000); see also *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 n.26 (1982) (“These policy considerations were for Congress to weigh, and we are not free to ignore the language and history of [the statute] even were we to disagree with the legislative choice.”).

In any case, neither of the “anomalies” that Amicus cites to support his rewriting of the statute even remotely justifies such drastic judicial surgery.

2. The first “anomaly” is the claim that a literal reading of the law enforcement proviso “would make the United States’ liability for workplace torts \* \* \* depend on whether the tortfeasor had the legal authority to

search, seize evidence, or make arrests.” Amicus Br. 13–14. But there are rational reasons for this distinction, and even if there were not, such claims represent a miniscule proportion of the conduct covered by the proviso.

It is hardly “inconceivable” (Amicus Br. 14) that Congress would choose to permit an additional avenue for the redress of workplace torts committed by federal law enforcement officers, as opposed to other federal employees. Federal law enforcement officers are typically authorized to carry weapons, to arrest and detain individuals, and to use lawful force in the execution of their duties. As a result, even a routine workplace dispute involving an armed law enforcement officer could escalate into the kind of serious confrontation that Congress might reasonably have considered more worthy of redress from the Treasury. Indeed, the leading case proposing the “law enforcement capacity” restriction involved just such an escalation. See *Orsay v. United States Dep’t of Justice*, 289 F.3d 1129 (9th Cir. 2002) (workplace dispute involving supervising federal marshall threatening and pointing loaded gun at subordinates).

Moreover, Amicus acknowledges that the public trust reposed in law enforcement officers carries a corollary: that such officers are often held to a higher standard of workplace behavior than their civilian counterparts. Rather than challenge this unobjectionable fact, Amicus questions the efficacy of the FTCA remedy, under which, he argues, “neither federal law-enforcement officers individually nor the agencies that employ them have any concrete [financial] incentive to try to avoid FTCA liability.” Amicus Br. 15–16.

This argument misapprehends the dual purpose of law enforcement proviso. The FTCA’s waiver of sovereign immunity fulfills the same function that the Court

attributed to the private cause of action created by 48 U.S.C. § 1983: It “was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well.” *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651–652 (1980). Exposing the Treasury to monetary liability “may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood” of such abuses, even if individual tortfeasors are not themselves held liable. *Id.* at 652.

But even if the Court is unconvinced of these rationales, it would still have no warrant to rewrite the plain language of the law enforcement proviso. In the nearly 40 years that the proviso has been in effect, Amicus can identify only a small handful of cases in which its waiver of sovereign immunity was invoked in connection with a workplace tort claim. Engrafting a wholly extra-textual, and ill-defined, “law enforcement capacity” requirement onto the statute to solve this non-problem would be an extreme case of the tail wagging the dog.

“The process of legislating often involves tradeoffs, compromises, and imperfect solutions, and our ability to imagine ways of redesigning the statute to advance one of Congress’ ends does not render it irrational.” *Preseault v. ICC*, 494 U.S. 1, 18 (1990). Rather than rewrite the statute, this Court should follow the more measured approach it took in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 565 (2005). There, like here, the Court faced an potential “anomaly” in the statutory scheme: Congress’ supplemental jurisdiction statute permitted the exercise of such jurisdiction over parties permissively joined in a lawsuit, but withheld supplemental jurisdiction over parties subject to compulsory joinder. The Court noted that the reason for the disparity was “not immediately obvious” and speculated that it

might have resulted from “an unintended drafting gap.” *Ibid.* (citation and internal quotation marks omitted). But in the end, it concluded that “[i]f that is the case, it is up to Congress rather than the courts to fix it.” *Ibid.* If Congress is troubled by the disparate treatment of workplace torts in a handful of cases, it could do the same here.

3. The second “anomaly” identified by Amicus is the proviso’s inclusion of “federal employees [who] possess one of the proviso’s enumerated authorities but rarely if ever exercise that authority.” Amicus Br. 17. Amicus asserts that there is “not a shred of evidence” that Congress intended the proviso to cover such “non-traditional” law enforcement officers. *Id.* at 22.

Of course, “the plain language of a statute is the best evidence of Congressional intent.” *McMellon v. United States*, 387 F.3d 329, 339 (4th Cir. 2004); see also *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, (1985). Here, Congress’s definition of “law enforcement officer” is precise and unambiguous: “*any* officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law.” 28 U.S.C. § 2680(h) (emphasis added). This definition controls even if it might conflict with Amicus’s amorphous conception of what constitutes a “traditional” law enforcement officer. See *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (“[w]hen a statute includes an explicit definition,” the court should follow that definition, “even if it varies from that term’s ordinary meaning”).

Moreover, many of Amicus’s “anomalous” federal employees in fact carry out prototypical law enforcement functions. For example, the U.S. Forest Service has a large staff of uniformed officers and special agents who carry out primary law enforcement functions throughout



almost 200 million acres of federal lands. See U.S.D.A. Forest Service Law Enforcement and Investigations website, *available at* <http://www.fs.fed.us/lei/>.<sup>2</sup> In the course of carrying out their duties, Forest Service officers “carry firearms, defensive equipment, make arrests, execute search warrants, complete reports and testify in court.” *Ibid.*

Similarly, federal prison guards are “law enforcement officers” under the ordinary meaning of the phrase, and have long been recognized as such by both Congress and the courts. As Justice Alito recently observed, “law enforcement purposes’ involve more than just investigation and prosecution.” *Milner v. Department of Navy*, 131 S. Ct. 1259, 1272 (2011) (Alito, J., concurring). In that vein, Black’s Law Dictionary, for example, defines “law enforcement” as the “detention *and punishment* of violations of the law.” Black’s Law Dictionary 964 (9th ed. 2009) (emphasis added). There is no question that “[p]risons perform as their principal function one of the most important duties pertaining to the enforcement of criminal laws, *i.e.*, the execution of sentences in criminal cases.” *Jordan v. United States Dep’t of Justice*, 668 F.3d 1188, 1194 (10th Cir. 2011) (quoting *Duffin v. Carlson*, 636 F.2d 709, 713 (D.C. Cir. 1980)). As the government successfully argued to this Court in *Ali*, “[Bureau of Prisons] officials plainly constitute ‘law enforcement officers’ under any definition of that phrase.” Government

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<sup>2</sup> For example, the Forest Service has an active drug interdiction program that eradicated over 1,462,800 marijuana plants from 19,380 national forest sites between 1996 and 1999—taking the equivalent of over 3.25 million pounds of illegally produced marijuana off the streets. U.S.D.A. Forest Service Law Enforcement and Investigations website, *available at* <http://www.fs.fed.us/lei/>.

Br. 15, *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (No. 06-9130), 2007 WL 2808467.

In accord with this understanding, Congress has classified prison officials as “law enforcement officials” in many other statutory contexts. See, e.g., 5 U.S.C. § 552a(j)(2) (Privacy Act); 5 U.S.C. § 5541(3) (civil service pay); 5 U.S.C. § 8331(20) (retirement benefits); 5 U.S.C. § 8401(17)(D)(i) (survivorship annuities); 18 U.S.C. § 3592(c)(14)(D) (aggravating factor for federal death penalty); 42 U.S.C. § 3796(b)(5) (death benefits); see generally *Chapa v. United States Dep’t of Justice*, 339 F.3d 388, 390 (5th Cir. 2003). Federal courts have done the same. See, e.g., *Ali*, 552 U.S. 214 (FTCA § 2860(c)); *Jordan*, 668 F.3d at 1194–1195 (FOIA); *United States v. Paul*, 614 F.2d 115 (6th Cir. 1980) (Federal Wiretap Act); see also *Tucker v. Department of Justice*, 70 Fed. Appx. 548, 551 (Fed. Cir. 2003) (“Correctional officers are law enforcement personnel holding positions vested with great trust and responsibility.”).

In short, there is nothing “anomalous” about classifying prison guards as law enforcement officers under § 2680(h). Not only are they authorized to carry out arrests and seizures—thereby satisfying the statutory requirements of the law enforcement proviso—they also “enforce” the “law” under any ordinary reading of that term. See *Jordan*, 668 F.3d at 1195. It would be entirely natural for Congress to expect prison guards to fall within the scope of the proviso’s waiver.

4. Nor should this Court be deterred by Amicus’s wholly unsupported speculation that reading the statute according to its terms would unleash a flood of “frivolous claims” and “retributive litigation” by prisoners. Amicus Br. 20. History gives lie to this fear. The law enforcement proviso has been in effect for almost four decades. During



that time, there is no evidence that courts in circuits that have applied its waiver broadly have experienced any litigation explosion. To the contrary, federal prisoners remain reluctant to turn to the courts to seek justice for even egregious violations of their rights—a tragic consequence of the systemic legal and practical obstacles they face. See Lewisburg Prison Project Br. 17–23; Lambda Legal Defense and Education Fund (“Lambda”) Br. 15–30.

There is no reason to credit Amicus’s inchoate “threat” of frivolous claims. We have a market test of that theory, and nothing suggests that courts in the Fourth or the Seventh Circuit, which have expressly rejected *Pooler* and embraced the broad waiver set forth in the proviso’s text, face any more frivolous prisoner claims than the Third or the Ninth Circuit.

**C. The legislative history does not support the implied law enforcement capacity requirement.**

Amicus acknowledges that the legislative history confirms Congress’s intent that the law enforcement proviso “apply to any case in which a federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.” S. Rep. No. 93-588 (1974), reprinted in 1974 U.S.C.C.A.N. 2789, 2790. But he reads the phrase “any case” simply to refer merely to “common-law torts as well as constitutional violations.” Amicus Br. 28. This reading is implausible.

As an initial matter, Congress’s expansive language—“any case”—sweeps in far more than just “common-law torts.” Cf. *Ali*, 520 U.S. at 220 (reading “any claim” to mean a claim “of any kind”). The passage makes explicit that the proviso would cover “any case” involving

an enumerated tort committed by a federal law enforcement officer "while acting within the scope of his employment." There is absolutely no requirement that the tort, whether constitutional or common law, be committed while the officer was acting in a law enforcement capacity. See *Sami v. United States*, 617 F.2d 755, 764 (D.C. Cir. 1979). The Report's "categorical and unqualified" language makes clear that "the government is to be liable *whenever* its agents commit constitutional torts and *in any case* in which a Federal agent commits acts which under accepted tort principles constitute one of the intentional torts enumerated in the proviso." *Sutton v. United States*, 819 F.2d 1289, 1296 (5th Cir. 1987) (emphasis in original).

The Court should also decline to infer a law enforcement capacity requirement from the House of Representatives' *absence* of "criticism that the bill would create liability for a large number of torts that have no connection to law enforcement." Amicus Br. 29. Where the statutory language is "unambiguous, silence in the legislative history cannot be controlling." *Dewsnup v. Timm*, 502 U.S. 410, 419-420 (1992). In any case, the Representatives' silence is more plausibly attributable to their uncontroversial acceptance of the proviso's application to law enforcement officers such as prison guards than to any confusion over the proviso's scope.

**D. Reading the statute faithfully does not produce absurd results.**

"This case is a far cry from the rare one where the effect of implementing the ordinary meaning of the statutory text would be 'patent absurdity.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563 (1994) (citation omitted). *Green v. Bock Laundry Machine Co.*, 490 U.S. 504

(1994), on which Amicus relies, demonstrates the wide gulf between this case and a truly absurd statutory text.

In *Green*, the Court construed Federal Rule of Evidence 609, whose language (as then formulated) required courts to admit prior felony convictions to impeach civil plaintiffs, but granted discretion to exclude such evidence when used against a civil defendant. This result was more than merely “anomalous.” As the Court noted, the disparity in treatment between litigants raised serious due process concerns. *Green*, 490 U.S. at 510–511; see also *id.* at 527 (Scalia, J., concurring) (literal reading of the statute “produces an absurd, and perhaps unconstitutional, result”). Moreover, the Court recognized that the use of the unadorned term “defendant” created ambiguity as to whether the Rule was intended to apply to civil as well as criminal defendants. See *id.* at 508–509; 527 (Scalia, J., concurring).

A literal reading of the law enforcement proviso, in contrast, presents no threat of unconstitutionality. Cf. *Crooks v. Harrelson*, 282 U.S. 55, 61 (1930) (“[U]nless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it has done so in plain terms \* \* \* it is not within the province of the court to modify the law by construction.”). Moreover, there is nothing at all ambiguous about the text of § 2860(h): the law enforcement proviso is laid out in exceptionally clear and precise terms. Cf. *Barnhart*, 534 U.S. at 459 (courts “rarely” invoke the absurd results test “to override unambiguous legislation”). And the two “anomalies” on which Amicus bases his absurdity argument hardly justify interpreting the words of the law enforcement proviso “against their literal meaning.” Amicus Br. 47; see II.B, *supra*.

Perhaps the best argument against absurdity, though, is a simple roll call of the jurists and advocates who have endorsed petitioner's position. Petitioner's plain-language reading of the statute has been adopted by several federal courts of appeals, and numerous district courts. See Petitioner's Br. 4 n.1. It has been endorsed by this Court in dicta. *Carlson v. Green*, 446 U.S. 14, 20 (1980). It is supported by the legislative history. And, most strikingly, it has been embraced by government, which, after initially opposing certiorari in the case, confessed error and filed a brief *in support of petitioner's position*. It would be strange indeed for so many observers to sign on to petitioner's position if it were, in fact, absurd.

### III. The Guards Acted Within The Scope Of Their Employment And In A Law Enforcement Capacity.

1. At every stage in this litigation, the government has conceded that the guards were acting within the scope of their employment J.A. 55, 85; Government Br. 30. Amicus responds that "executive branch officials cannot waive sovereign immunity." Amicus Br. 56 (citation omitted). That is true, but also irrelevant. Congress already acted to waive sovereign immunity in 1974, when it enacted the law enforcement proviso. The scope of employment question relates not to whether the United States has waived sovereign immunity—all parties agree that it has—but rather to whether the conduct alleged in this case fall within the scope of that waiver. That is a factual question not for congressional legislation, but for judicial determination. *United States v. County of Cook*, 167 F.3d 381, 387 (7th Cir. 1999) ("A court with authority to consider and reject an invocation of sovereign immunity also has authority to enter judgment adverse to the interests of the United States without 'waiving' (or violat-



ing) that immunity.”). And it is a question that the United States, as the defendant in this case, may choose either to contest or to concede.

Just as a party may concede the presence of diversity or the satisfaction of an amount-in-controversy requirement without doing harm to Congress’s power to establish federal subject-matter jurisdiction, so too may the executive branch concede that its employee was acting within the scope of his employment without usurping Congress’s power to waive sovereign immunity. Courts routinely give effect to such concessions, as should this Court. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 (1995) (where United States certifies that an employee was acting within the scope of his employment, “the United States, by certifying, is \* \* \* exposing itself to liability as would any other employer at common law who admits that an employee acted within the scope of his employment.”).

2. Even if the government’s concession was not effective, the allegations of this case demonstrate clearly that the prison guards were acting both within the scope of their employment and (if the Court deems it relevant) in a law enforcement capacity.

a. The facts alleged by petitioner paint a disturbing picture of prison guards using physical and sexual assault, carried out under color of their law enforcement authority, as tool to maintain control over inmates.

After an altercation with his cellmate, petitioner was removed from his cell and placed in a shower area. J.A. 35, 70. Officer Pealer—one of the guards who would be involved in the assault—told petitioner that he was “tired of [petitioner’s] fucking crying” because petitioner had complained that “my life and safety were in danger.” J.A. 71. Officer Pealer accused petitioner of “mouthing off to

staff" and told him "[w]e are going to show you what Lewisburg is all about." J.A. 35.

Pealer then moved petitioner to a basement holding area, outside the range of surveillance cameras. J.A. 12, 35, 71. Pealer and another prison official placed petitioner in a chokehold, forced him to his knees, and sexually assaulted him, while the third guard stood watch. J.A. 35, 71–72. One guard called petitioner "a little snitch bitch," and the officers threatened to kill him if he told anyone what had happened. J.A. 36, 72.

b. As an initial matter, under Pennsylvania law, the question of whether an employee is acting within the scope of employment is ordinarily a question of fact for the jury. *Nelson v. City of Philadelphia*, 613 A.2d 674, 679 (Pa. Cmwlth. 1994) (citing *Iandiorio v. Kriss & Senko Enterprises*, 517 A.2d 530 (Pa. 1986)). It would therefore be inappropriate to bar petitioner's suit at this stage of the proceedings, before discovery has even taken place.

Pennsylvania courts take the scope-of-employment determination away from the jury only in very narrow circumstances—specifically, where the assault "is committed for personal reasons or in an outrageous manner." *Fitzgerald v. McCutcheon*, 410 A.2d 1270, 1272 (Pa. Super. 1979).<sup>3</sup> Neither of those circumstances is present here.

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<sup>3</sup> The facts of *Fitzgerald*—the only Pennsylvania law enforcement case cited by Amicus—are miles away from the facts of this case. In *Fitzgerald*, the court held that a police officer's shooting of his neighbor while off duty and outside the workplace was outside the scope of the officer's employment, where the shooting was "motivated by reasons personal to himself." Here, in contrast, the assault occurred at the prison, during the guards' working hours. The victim



Petitioner's allegations demonstrate that the torts at issue were not committed solely for personal reasons, but rather were motivated at least in part by a desire to serve the officers' employer, the Federal Bureau of Prisons. The guards' statements—accusing petitioner of being a “snitch,” complaining about his “crying” and “mouthing off to staff,” and telling him that “[w]e are going to show you what Lewisburg is all about”—suggest that the officers were using “the threat of sexual violence to control inmates.” Lambda Br. 24–25. Such conduct is reprehensible, but it is not purely personal. This conduct, which occurred on prison grounds during work hours, and was directed toward a prison inmate, should be considered within the scope of employment. See, e.g., *Orr v. William J. Burns Int'l Detective Agency*, 12 A.2d 25 (Pa. 1940) (private detective who shot picketing striker was acting within scope of employment); *Sebastianelli v. Cleland Simpson Co.*, 31 A.2d 570 (Pa. Super. 1943) (same for detectives who assaulted suspected shoplifter, causing miscarriage); *McHale v. Bensalem Country Club*, No. 90–11160–16–2, 1993 WL 722303 (Pa. Com. Pl. Jan. 14, 1993) (same for doormen who pushed bar patron down stairs, restrained him, and took turns brutally punching and kicking him); see also *Straiton v. Rosinsky*, 188 A.2d 257 (Pa. Super. 1957).

Nor, given the context, is the conduct alleged here so “outrageous” as to be outside the scope of employment as

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was a federal inmate—one of the class of individuals who the tortfeasors were required to monitor and supervise. And the officers' statements before and during the assault strongly suggest that they were motivated not by personal reasons, but rather by a desire to exercise control over a prisoner who they had deemed a “snitch” and a troublemaker.

a matter of law. Rape and assault of inmates by prison guards is, tragically, not a rare or unforeseeable occurrence. See Lambda Br. 16-28. And, while the Pennsylvania courts do not appear to have ruled on the issue, many jurisdictions hold that sexual assault by a law enforcement officer can be within the scope of employment. See *id.* at 13 n.4. The Pennsylvania cases cited above—which hold that assaults ranging from shootings to miscarriage-inducing beatings can fall within the scope of employment—establish a baseline that could comfortably encompass the conduct at issue here.

c. Finally, to the extent that the Court deems it relevant, the conduct at issue here was within the prison guard's law enforcement function. As explained above, the guards' conduct took place on prison grounds, during their work hours, and was directed at securing compliance (albeit in a brutal and horrific way) from an inmate. This case involves "allegations of abuse and intentional tortious conduct by a government official authorized to use necessary and reasonable force in carrying out his law enforcement duties." *Flores-Romero v. United States*, No. 07-3269-SAC, 2011 WL 4526771, \*5 (D. Kan. Sept. 28, 2011). That is precisely the kind of conduct the law enforcement proviso was intended to address.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2013

# **REPLY BRIEF**

**In the Supreme Court of the United States**

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KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**REPLY BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

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No. 11-10362

KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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## REPLY BRIEF FOR THE UNITED STATES

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The law-enforcement proviso to the intentional-tort exception in the Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity from certain intentional-tort claims arising from the acts or omissions of "investigative or law enforcement officers." 28 U.S.C. 2680(h). The proviso defines "investigative or law enforcement officer" to mean "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.* The Third Circuit held in *Pooler v. United States*, 787 F.2d 868, 872, cert. denied, 479 U.S. 849 (1986), that the proviso allows claims "only [for] conduct [by a federal law-enforcement officer] in the course of a search, a seizure, or an arrest." The Third Circuit applied that holding here to affirm the grant of summary judgment for the government on petitioner's intentional-tort claim. J.A. 103-104.

The government's opening brief explains that the Third Circuit erred because the law-enforcement proviso unambiguously applies to any FTCA claims arising out of the proviso's six listed intentional torts with regard to the wrongful acts or omissions of an "investigative or law enforcement officer" acting within the scope of his employment. U.S. Br. 12-29. The text of Section 2680(h) and the FTCA's broader structure clearly establish that the proviso's application is not limited to those acts or omissions that occur when an officer executes a search, seizes evidence, or makes an arrest for a violation of federal law. *Id.* at 19-22.

The Court-appointed amicus (Amicus) makes a single textual argument to defend the judgment below: The phrase "acts or omissions of investigative or law enforcement officers," 28 U.S.C. 2680(h), should be read to include an "implied caveat" that the proviso applies only to acts or omissions of "investigative or law enforcement officers" when they are "*acting as such.*" Br. 10; see Br. 5, 13, 40-41, 51. Although there is force to Amicus's position as a policy matter and the United States would prefer such an outcome from that perspective, the United States has concluded that Amicus's position ultimately does not reflect a plausible reading of the statutory text and structure that would defeat the waiver of sovereign immunity here. Amicus's alternative contention that the alleged assault here was outside the officers' "scope of employment," Br. 55-61, lies outside the question presented and does not warrant this Court's review.



**I. SECTION 2680(h)'S LAW-ENFORCEMENT PROVISIO IS NOT LIMITED TO CLAIMS THAT ARISE FROM CONDUCT OCCURRING DURING A SEARCH, A SEIZURE OF EVIDENCE, OR AN ARREST**

**A. No Interpretive Tools Support Amicus's Limitation**

Amicus does not appear to dispute that a Federal Bureau of Prisons (BOP) officer, like the officers here, "qualif[ies] as an 'investigative or law enforcement officer'" under Section 2680(h)'s definition of that term based on that officer's "legal authority to make arrests." Br. 19; see Br. 17, 50, 52-54; cf. *McCarthy v. Madigan*, 503 U.S. 140, 154 n.6 (1992). Amicus instead contends that the phrase "acts or omissions of investigative or law enforcement officers" in 28 U.S.C. 2680(h) refers only to acts or omissions by such officers when they are "act[ing] in an investigative or law-enforcement *capacity*—i.e., when [they are] exercising [their] investigative or law-enforcement authority." Br. 10. But Amicus's so-called "implied caveat" has no foundation in the statutory text or structure.

1. Amicus ignores the fact that the statutory phrase "acts or omissions of investigative or law enforcement officers" incorporates Section 2680(h)'s definition of the term "investigative or law enforcement officer." See 28 U.S.C. 2680(h). Because that term means "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law," *ibid.*, the relevant statutory phrase applies Section 2680(h)'s proviso to the "acts or omissions of \* \* \* any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." Nothing in that text suggests that the relevant "acts or omissions" are only those of officers who at the time are

actually exercising investigative or law-enforcement authority.

Amicus contends that, in common usage, a “statement referring to persons by their role or status” is often “implicitly limited to situations where the person acts in [that] role.” Br. 10. But even accepting that premise *arguendo*, the “role or status” to which Section 2680(h) directly refers is that of an “officer of the United States.” When defining the term “investigative or law enforcement officer” to mean “any officer of the United States *who is empowered by law* to execute searches, to seize evidence, or to make arrests for violations of Federal law,” 28 U.S.C. 2680(h) (emphasis added), Congress would have recognized that those federal “officers” would not be limited to the performance of searches, seizures, or arrests, but also would perform other functions. The definition thus requires that the alleged tortfeasor both qualify as a federal “officer” *and* be “empowered by law” (without necessarily exercising the power at any particular time) to execute searches, seize evidence, or make arrests. An individual will act in his “role or status” (Amicus Br. 10) as a federal “officer” as long as his acts or omissions are within the scope of his employment as such an officer. Indeed, the law-enforcement proviso itself directs that the “provisions of \* \* \* [S]ection 1346(b)” shall apply to intentional-tort claims based on the conduct of such officers, and Section 1346(b) authorizes claims arising from the “wrongful act or omission” of a federal employee “while acting within the scope of his office or employment,” 28 U.S.C. 1346(b)(1). See U.S. Br. 19-20.

Amicus’s two illustrations of his point (Br. 10-11) do little more than reflect the importance of context in interpreting language. First, the adjective “impartial”

in the statement “a judge should be impartial” (Br. 10) itself connotes judicial action because it evokes a background understanding that judges should decide cases impartially and because few would expect judges to have such firm impartiality in their private views. “A judge should be trustworthy,” on the other hand, suggests a broader application than to just judicial acts. Second, Amicus quotes (*ibid.*) the Court’s statement that “[p]rosecutors enjoy absolute immunity from damages liability” in *Supreme Court v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 736 (1980) (citing *Imbler v. Pachtman*, 424 U.S. 409 (1976)). But that quotation came after the Court’s observation that judges “enjoy absolute immunity from damages liability for acts performed in their judicial capacities.” *Id.* at 734-735. The statement concerning prosecutors is thus logically understood in the context of the opinion as reflecting a parallel restriction, as the Court’s citation to *Imbler* confirms. See *Imbler*, 424 U.S. at 431 (prosecutorial immunity for “initiating a prosecution” and “presenting the State’s case”). Lawyers can be trusted to read such statements in context without an express list of every pertinent qualifier and predicate condition. Cf. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) (“[T]he language of an opinion” should be “read in context” and not “parsed as though we were dealing with language of a statute.”).<sup>1</sup>

Amicus’s view (Br. 10) that Section 2680(h)’s proviso applies only when a federal officer is actively engaged in

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<sup>1</sup> *Consumer Union*’s references to absolute immunity from personal damages actions based on the function performed were developed in a common-law manner, and therefore do not control in the different context here, which involves a statutory waiver of federal sovereign immunity.

an investigative or law-enforcement capacity by “exercising his investigative or law-enforcement authority” underscores the lack of a textual foundation for his reading. The phrase “investigative or law enforcement” appears in Section 2680(h) only as part of the defined term “investigative or law enforcement officer.” And because Section 2680(h) defines what that term “means,” 28 U.S.C. 2680(h), its definition “excludes any meaning that is not stated.” *Burgess v. United States*, 553 U.S. 124, 130 (2008) (citation omitted). The phrases “investigative or law-enforcement capacity” and “investigative or law-enforcement authority,” by contrast, do not appear in Section 2680(h).

Amicus contends that the exercise of “investigative or law-enforcement authority” includes (1) executing a search, seizing evidence, or making an arrest, (2) performing “closely related” activities or taking actions “incident” to a search or arrest, and perhaps (3) performing “other investigative or law-enforcement activities beyond the three [*i.e.*, executing searches, seizing evidence, and making arrests] that Congress enumerated.” Br. 5, 13, 40-41, 51. Amicus asserts that there is no need in this case to “plot the outer reaches of the proviso” as he understands it. Br. 52. But plotting out what “investigative or law-enforcement authority” might mean would require the courts to map that extra-statutory concept without the guiding compass of statutory text. The Third Circuit’s more restrictive reading in *Pooler*, which reads the proviso to “apply only to conduct ‘in the course of a search, a seizure, or an arrest,’” *Matsko v. United States*, 372 F.3d 556, 560 (3d Cir. 2004) (describing *Pooler*), at least has the textual advantage of adhering to the three categories of actions



that Section 2680(h) specifies in its definition of “investigative or law enforcement officer.”

Amicus’s position also runs counter to this Court’s interpretation of another provision in Section 2680. Section 2680(c) bars claims arising from the detention of property “by any officer of customs or excise or any other law enforcement officer.” 28 U.S.C. 2680(c). In *Ali v. BOP*, 552 U.S. 214 (2008), the Court refused an invitation to limit the phrase “any other law enforcement officer” to such officers who are “*acting in a customs or excise capacity*,” because “[n]othing in the statutory context require[d] a narrowing construction” and because accepting the plaintiff’s position would have required Congress to “write less economically” in order to “clarify its intent to cover all law enforcement officers by adding phrases such as ‘performing any official law enforcement function,’ or ‘without limitation.’” *Id.* at 221, 227. The same reasoning applies to the “implied caveat” that Amicus suggests be read into Section 2680(h)’s text. Had Congress intended to limit the proviso’s reach as Amicus contends, it “easily could have written” (*id.* at 227) the proviso to apply to “acts or omissions of investigative or law enforcement officers *exercising investigative or law-enforcement authority*” or, more economically, “acts or omissions of officers of the United States *exercising investigative or law-enforcement authority*.”

Indeed, *Ali*’s rationale applies with even greater force here. Whereas the term “law enforcement officer” in Section 2680(c) is not defined, the phrase “investigative or law enforcement officer” in Section 2680(h) is specifically defined to turn on the individual’s status as an “officer of the United States” and on the legal *authority* to execute searches, seize evidence, or make

arrests—not on any specific exercise of that authority. Moreover, the law-enforcement proviso provides that “[S]ection 1346(b) of this title shall apply” to any specified intentional-tort claims arising from the acts of an investigative or law enforcement officer. Thus, the proviso applies to the acts or omissions of an officer “while acting within the scope of his office or employment,” 28 U.S.C. 1346(b)(1), not simply while exercising certain authority associated with his position. U.S. Br. 19-20.

Amicus makes no attempt to address those textual features of Section 2680(h). Nor does Amicus confront the fact that when Congress has intended to limit the FTCA’s waiver of sovereign immunity to exclude certain activities of federal employees, it has used text in Section 2680 expressly to identify those activities. See U.S. Br. 22 (discussing, *e.g.*, 28 U.S.C. 2680(a)-(c)). Those provisions demonstrate that Congress understood the distinction between text describing torts based on the status of the tortfeasor and those based on the nature of the conduct. In short, Amicus’s reliance on his “implied caveat” to limit the scope of Section 2680(h) is inconsistent with the FTCA’s overall design.

Amicus contends (Br. 11-12) that his implied-caveat-based reading is supported by this Court’s decisions concluding that, under the Employee Retirement Income Security Act of 1974 (ERISA), an employer acts as a “fiduciary” only when it performs a fiduciary function. But those decisions arose in a quite different statutory context. ERISA defines the term “fiduciary” based on function, not status, by specifying that “a person is a fiduciary with respect to a[n] [ERISA] plan *to the extent*” that he “exercises” certain authority, “renders” certain advice, or has certain discretionary authority or



responsibility “in the administration of such plan.” 29 U.S.C. 1002(21)(A) (emphasis added). Congress’s choice to use the phrase “to the extent” rather than “if” reflects that an entity like an employer may have “two hats to wear”—one fiduciary, one not—and that ERISA requires that such an entity “wear only one [hat] at a time, and wear the fiduciary hat when making fiduciary decisions.” *Pegram v. Herdrich*, 530 U.S. 211, 225-226 (2000) (person is a “fiduciary only ‘to the extent’ that he acts” in that capacity); see *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (explaining that the Court’s reading “is rooted in the text of ERISA’s definition of fiduciary”); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 104-105 (1993) (distinguishing statutory use of “to the extent” from “if”).<sup>2</sup> Congress used analogous text in the FTCA to authorize claims based on the acts or omissions of federal employees “while acting within the scope” of their employment, 28 U.S.C. 1346(b), and in limiting the Act’s waiver of sovereign immunity by excluding specified categories of activities of such employees, *e.g.*, 28 U.S.C. 2680(a)-(c). But Congress used no similar text in the law-enforcement proviso to Section 2680(h).<sup>3</sup>

2. Amicus’s discussion (Br. 26-29) of the law-enforcement proviso’s limited legislative history likewise

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<sup>2</sup> See also, *e.g.*, 7 U.S.C. 608c(13)(B) (certain agricultural orders are not “applicable to any producer in his *capacity as a producer*”) (emphasis added). Petitioners in *Horne v. Department of Agriculture*, No. 12-123 (oral argument scheduled for Mar. 20, 2013), challenge agricultural orders issued under Section 608c.

<sup>3</sup> Amicus’s reliance (Br. 12) on several lower court decisions is misplaced. Like this Court’s ERISA-fiduciary decisions, those cases involve materially different statutory text and contexts that are not comparable to that of the law-enforcement proviso and its statutory definition of “investigative or law enforcement officer.”

does not support his reading. The government previously cited (U.S. Br. 24-25) a committee report's statement that the proviso "should not be viewed as limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment." S. Rep. No. 588, 93d Cong., 1st Sess. 4 (1973) (*Senate Report*). Amicus responds by arguing that the passage's use of "any case" after "constitutional tort" simply reflects that "the proviso's waiver encompassed common-law torts as well as constitutional violations." Br. 28. But Amicus's reading ignores the report's explanation that the proviso applies in "any case" in which the officer was "acting within the scope of his employment." This statement sweeps more broadly than Amicus's reading. That breadth, moreover, is reflected in the committee's explanation that the proviso would waive "sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the [six listed intentional] torts." *Senate Report* 3. Both statements reflect that the proviso applies to the tortious conduct of federal law-enforcement agents acting in the "scope of their employment," without any suggestion that it applies only when they exercise specific law-enforcement authority. U.S. Br. 24-25.

**B. The Government's Reading Does Not Produce Anomalous Or Absurd Results**

Amicus contends that reading Section 2680(h) to include his implied caveat best accords with "common sense" because petitioner's (and the government's) contrary interpretation would yield two purportedly "anomalous" and "absurd" results. Br. 13-22, 46-50.

Amicus identifies no anomaly, let alone an absurd result, that would support his reading.

1. Amicus first contends (Br. 13-17, 24) that imposing liability for the intentional torts of a federal officer based on his legal authority to execute searches, seize evidence, or make arrests would create an “‘arbitrary distinction’” and produce “bizarre result[s],” particularly in the context of employee-on-employee “‘workplace torts,’” because no liability would result if the same tort were committed by a different federal employee who lacked such authority. Br. 14 (quoting *Orsay v. United States Dep’t of Justice*, 289 F.3d 1125, 1134 (9th Cir. 2002)). Amicus’s specific example is misplaced, because a federal employee’s injury from a workplace tort likely would be covered by the Federal Employees’ Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, which applies broadly to workplace injuries and which, when applicable, precludes an FTCA action. 5 U.S.C. 8116(c); see, e.g., *Borneman v. United States*, 213 F.3d 819, 829 n.3 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001); *McDaniel v. United States*, 970 F.2d 194, 197 (6th Cir. 1992); *Green v. Hill*, 954 F.2d 694, 697 & n.8 (per curiam), modified on other grounds, 968 F.2d 1098 (11th Cir. 1992); *Heilman v. United States*, 731 F.2d 1104, 1111 n.6 (3d Cir. 1984).<sup>4</sup>

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<sup>4</sup> Although the Department of Labor has informed this Office that it has consistently interpreted FECA as covering all conditions, emotional or physical, the Ninth Circuit has stated that emotional-distress claims entirely “divorced from any claim of physical harm” fall outside of FECA and therefore may be brought under the FTCA. See *Sheehan v. United States*, 896 F.2d 1168, 1174, amended, 917 F.2d 424 (1990); cf. *Moe v. United States*, 326 F.3d 1065, 1068-1069 (9th Cir.) (“psychological injuries [are covered] when accompanied by physical injuries”), cert. denied, 540 U.S. 877 (2003); *Figueroa v. United States*, 7 F.3d 1405, 1407-1408 (9th Cir. 1993) (limiting

Amicus is also mistaken more generally. It is not anomalous for Congress to decide to treat two otherwise identical torts differently when one is committed by a law-enforcement officer and the other is not. Amicus himself acknowledges that it may well be “plausible that Congress might wish to hold law-enforcement officers to a higher standard.” Br. 16. Congress could reasonably conclude that the government should generally bear greater responsibility for intentional torts committed by officers on whom the government has conferred special law-enforcement authority. Authority to execute searches, seize evidence, and make arrests should normally be conferred only on individuals with specialized law-enforcement training and a higher degree of self-discipline and control than other employees. When such an officer commits one of the *intentional* torts covered by the proviso—“assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution,” 28 U.S.C. 2680(h)—Congress reasonably could conclude that the United States should be held liable, even though the same tort by a federal employee without such authority would not trigger liability.

2. Amicus next contends (Br. 17-22) that it is “bizarre” that Congress would expose the federal fisc to tort liability for what he asserts are “untold numbers of federal employees who technically meet the status-based definition of ‘investigative or law enforcement officers.’”

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*Sheehan* and affirming dismissal of FTCA emotional-distress claim), cert. denied, 511 U.S. 1030 (1994). Other courts disagree. See, e.g., *Mathirampuzha v. Potter*, 548 F.3d 70, 84 (2d Cir. 2008) (citing cases finding coverage); *Spinelli v. Goss*, 446 F.3d 159, 161 (D.C. Cir. 2006) (Secretary’s FECA emotional-injury interpretation controls in FTCA actions). That principle would not affect claims like petitioner’s, which allege a physical assault and battery. See Amicus Br. 14 n.3.



Br. 17. Amicus asserts, for example, that “[m]any federal employees” possess—but rarely exercise—legal authority to execute searches, seize evidence, or make arrests, and that those employees “qualify as ‘investigative or law enforcement officers’ under the plain language of [Section 2680(h)’s] definition,” even though they “generally do not act as such.” *Ibid.* Amicus’s concern is misplaced and reflects a mistaken view of the category of officers who are covered.

The scope of the term “investigative or law enforcement officer” is not directly involved in this case and need not be resolved by the Court here.<sup>5</sup> Properly construed, however, that term applies only to federal officers who are authorized by law to conduct the traditional law-enforcement functions of executing law-enforcement searches, seizing evidence of a criminal offense, or making arrests for violations of federal criminal law; it does not extend to employees who conduct inspections or seizures of a regulatory or administrative nature. U.S. Br. 31-32. That conclusion flows directly from the statutory text.

The term “investigative or law enforcement officer” and its statutory definition both encompass only federal “officers,” 28 U.S.C. 2680(h), not the broader category of

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<sup>5</sup> Amicus believes (Br. 25-26) that the meaning of that definition is properly before the Court. But Amicus has not argued that BOP officers are excluded from that definition. Indeed, he appears to agree they satisfy its terms. See Br. 17, 19, 50, 53-54. Amicus instead argues that the phrase “acts or omissions of investigative or law enforcement officers” should be limited to such officers’ conduct when actually exercising law-enforcement authority. Br. 10-13. Amicus therefore disputes the scope of that definition only in the context of his argument that government employees *other* than BOP officers might qualify as “investigative or law enforcement officers” whose intentional torts could give rise to FTCA liability. Br. 18-22.

all government “employee[s]” whose acts or omissions may elsewhere trigger the FTCA’s waiver of sovereign immunity, 28 U.S.C. 1346(b)(1). A common meaning of “officer,” moreover, is “one charged with administering and maintaining the law (as a constable, bailiff, sheriff).” *Webster’s Third New International Dictionary of the English Language* 1567 (1993) (illustrating the term with the phrase “[officer]s of the peace”).<sup>6</sup> Such officers have responsibilities in criminal law enforcement. That understanding is reinforced by the fact that the federal “officers” identified in Section 2860(h) are only those specifically “empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law,” 28 U.S.C. 2680(h)—acts that collectively evoke criminal-law-enforcement functions. Thus, the interpretation of the proviso as limited to the criminal-law-enforcement context follows from the “commonsense canon of *noscitur a sociis*,” which teaches that “a word is given more precise content by the neighboring words with which it is associated.” *United States v. Williams*, 553 U.S. 285, 294 (2008); see *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (canon applies even where the relevant “phrase is preceded by [the word] ‘any’”). That reading also faithfully reflects the legislative history: Congress enacted the law-enforcement proviso to respond to abuses of criminal-law-enforcement authority involving searches, seizures, and

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<sup>6</sup> Although federal “employees” may in certain limited contexts be authorized to search, seize evidence, or make arrests, Congress applied Section 2680(h)’s proviso only to federal “officers” not “employees.” Thus, for example, the proviso applies to the Forest Service’s “special agents and law-enforcement officers,” see 16 U.S.C. 559c, but not (contrary to Amicus’s assertion, Br. 18) to all other “persons employed in the Forest Service,” 16 U.S.C. 559.



arrests. U.S. Br. 24. Ultimately, however, even if the scope of the proviso were ambiguous, its 1974 waiver of sovereign immunity from intentional-tort claims—which Congress had previously preserved in the intentional-tort exception to the FTCA—should be narrowly construed and limited to criminal-law-enforcement contexts. See *id.* at 17-18 & n.4.

Amicus nevertheless asserts (Br. 18) that federal judges qualify as law-enforcement officers who “make arrests,” and therefore are officers whose intentional torts would give rise to liability under Section 2680(h). That is incorrect. Although 18 U.S.C. 3041 specifies that an offender may be “arrested” by a judge or magistrate “as provided by [C]hapter 207 of [Title 18],” 18 U.S.C. 3041, Chapter 207 clarifies that “Section 3041” simply confers upon a “judicial officer authoriz[ation] to *order* the arrest.” 18 U.S.C. 3141(a) (emphasis added). That authority to order that an arrest be made by another is different from authority “to make [the] arrest[.]” itself. 28 U.S.C. 2680(h). And even if the intentional-tort exception applied to judicial acts, no liability would result because the United States benefits from “any defense based on judicial \* \* \* immunity which otherwise would have been available” to the judge, 28 U.S.C. 2674. See *Stump v. Sparkman*, 435 U.S. 349 (1978); *Christensen v. Ward*, 916 F.2d 1462, 1472-1473 (10th Cir.), cert. denied, 498 U.S. 999 (1990); *Sharma v. Stevas*, 790 F.2d 1486 (9th Cir. 1986).<sup>7</sup>

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<sup>7</sup> *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986), does not hold otherwise. *Arnsberg* in dicta characterized as “somewhat credible” the argument that a magistrate could be an “investigative or law enforcement officer” if he actually apprehended a suspect, but it ultimately held that such an argument would not apply to the case before it, which involved a magistrate’s

Amicus is similarly mistaken that employees who conduct administrative and regulatory inspections qualify as “investigatory or law-enforcement officers.” Br. 21. Such an employee would not qualify as a federal officer authorized to conduct criminal-law-enforcement functions. See pp. 14-15, *supra*; U.S. Br. 31 (citing cases). Tellingly, Amicus fails to identify any contrary precedent.

3. Amicus argues (Br. 24-25, 50-55) that BOP officers are not “traditional” law-enforcement officers under the government’s reading of the proviso. Amicus contends (Br. 52-53) that BOP officers “possess ‘investigative or law enforcement’ authority only vis-a-vis non-inmates,” because their authority to make warrantless “arrests” under 18 U.S.C. 3050 and 28 C.F.R. 511.18 concerns warrantless arrests of non-inmates and escaping inmates, which are “entirely inapplicable to the[ir] daily work” that involves only prison “security.” Amicus is incorrect. Although the arrest authority of BOP officers is primarily limited to arrests within BOP facilities, 18 U.S.C. 3050(2)-(3), such that “federal officers” employed by BOP operate under a “more restrictive” statutory standard for warrantless arrests than “[o]ther federal law enforcement officers,” *United States v. Watson*, 423 U.S. 411, 416 & n.5 (1976), BOP officers remain the government’s on-site law-enforcement officers for such facilities, notwithstanding their parallel correctional authority for maintaining institutional security.

Congress presumably saw no need expressly to authorize BOP officers to make warrantless “arrests” of inmates in 18 U.S.C. 3050, because inmates are in federal custody and thus already subject to federal control.

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adjudicatory decision and issuance of an arrest warrant. *Id.* at 975, 978 n.5.

But that does not suggest that BOP officers lack authority to seize inmates who have committed federal offenses. They are specifically empowered to use appropriate force against an inmate not only to "prevent[] \* \* \* a crime" from occurring but also to perform their duty of "apprehen[ding]" an inmate "who has committed a crime." 28 C.F.R. 552.22(c)(3). Such an application of "physical force" to apprehend and control an inmate who violated federal criminal law would not implicate constitutional requirements for arrests, but it would qualify as an "arrest" under the common-law understanding of the term. See *California v. Hodari D.*, 499 U.S. 621, 624, 626 (1991). And once an inmate has been secured, BOP may remove the inmate from the general prison population while he is "under investigation or awaiting a hearing" for a violation of "criminal law." 28 C.F.R. 541.23(c)(1).

BOP officers are also authorized to execute searches and seize evidence of criminal offenses in BOP correctional facilities. It is a federal offense, for instance, for an inmate to possess contraband or for a visitor to provide it. 18 U.S.C. 1791(a). BOP officers have authority to search for and "seize[] property as evidence" of such "criminal" offenses, 28 C.F.R. 553.13(b)(1). See, *e.g.*, 18 U.S.C. 4012; 28 C.F.R. 511.13, 511.15, 552.11, 552.14, 553.13(a). Numerous other federal crimes may be committed on the premises of BOP correctional facilities, including state-law crimes incorporated and made applicable to federal enclaves by the Assimilative Crimes Statute, 18 U.S.C. 13. See *United States v. Sharpnack*, 355 U.S. 286, 287-289 & n.3 (1958); *United States v. Piggie*, 622 F.2d 486, 487-488 (10th Cir.), cert. denied, 449 U.S. 863 (1980); *United States v. Blunt*, 558 F.2d 1245, 1246-1247 (6th Cir. 1977) (*per curiam*); see also,

*e.g.*, 18 U.S.C. 113 (assault), 1111, 1118 (murder), 1792 (riot). BOP officers are the first responders for such offenses. Although BOP has informed this Office that it ordinarily will summon other federal law-enforcement agencies (normally, from the Federal Bureau of Investigation) for continued investigation of more serious matters, BOP officers remain the government's on-site law-enforcement officers for BOP facilities.

4. Amicus suggests (Br. 19-21) that applying the law-enforcement proviso in prison contexts "would let loose a flood of FTCA claims by prisoners" for alleged intentional torts by BOP officers. That concern is not unique to the law-enforcement proviso. Prisoners, for instance, have long been able to pursue negligence actions under the FTCA, *United States v. Muniz*, 374 U.S. 150 (1963), and can bring claims under sources of law other than the FTCA.

Rather than foreclose all prisoner claims, Congress passed the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Tit. I, §101[(a)] [Tit. VIII], 110 Stat. 1321-66, to target the actions most subject to abuse. The PLRA, for instance, amended the FTCA to bar claims for mental or emotional injuries by prisoners held or imprisoned for felony offenses without a prior showing of physical injury, 28 U.S.C. 1346(b)(2), but did not otherwise modify the FTCA's tort remedies. Congress instead chose to "discourage prisoners from filing claims that are unlikely to succeed" by, *inter alia*, "requir[ing] all inmates to pay filing fees," and generally "den[ying] *in forma pauperis* status to prisoners with three or more prior 'strikes'" for claims that are "frivolous, malicious, or fail[] to state a claim." *Crawford-El v. Britton*, 523 U.S. 574, 596 (1998) (discussing 28 U.S.C.



1915(b) and (g)). The PLRA appears to have had “its intended effect.” *Id.* at 597.<sup>8</sup>

5. Amicus notes (Br. 30-33) that the position he advocates has been adopted by the Ninth Circuit in *Orsay*, a panel of the Fifth Circuit in the non-precedential opinion in *Cross v. United States*, 159 Fed. Appx. 572 (2005) (*per curiam*), and a handful of district courts. But see, *e.g.*, *Ignacio v. United States*, 674 F.3d 252, 255 (4th Cir. 2012), and *Sami v. United States*, 617 F.2d 755, 764-765 & n.13 (D.C. Cir. 1979) (rejecting asserted “limitation” requiring “actual participation in making arrests or conducting investigations”), abrogated on other grounds by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). None of those decisions, however, provides persuasive reasoning. *Orsay* held that Section 2680(h)’s text was “reasonably susceptible of an interpretation” that would limit liability to intentional torts committed “in the course of investigative or law enforcement activities.” 289 F.3d at 1134. But *Orsay* provides no textual basis for that holding and, instead, relies on its own policy assessment that it would be “arbitrary” and “bizarre” to treat workplace torts differently depending on the law-enforcement status of the tortfeasor, *ibid.*, and *Orsay* makes no mention of FECA’s bar to recovery under the FTCA by an employee injured by the acts of a fellow employee. See pp. 11-12, *supra*. The unpublished *Cross* decision reaches the same conclusion but with even less analysis. 159 Fed. Appx. at 576. None of the lower court decisions provides any further basis for adopting Amicus’s “im-

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<sup>8</sup> Although petitioner has filed multiple meritless actions, U.S. Br. 2 n.1, the government has not (yet) invoked the PLRA’s three-strikes provision in this case.

plicit caveat"-based reading of the law-enforcement proviso.<sup>9</sup>

## II. THE COURT SHOULD NOT RESOLVE AMICUS'S ALTERNATIVE ARGUMENT BASED ON STATE LAW

In district court, the government conceded, at least for purposes of its summary judgment motion, that Officer Pealer was acting within the scope of his employment. J.A. 55, 85; U.S. Br. 30. It instead argued that dismissal was warranted under binding precedent (*Pooler*). As Amicus suggests (Br. 56-60), the government might have also argued below that, if the truth of petitioner's allegations are assumed *arguendo*, the BOP officers at issue would not have been acting within the scope of their employment. That question, which turns on Pennsylvania law, might be raised on remand. But it is not within the scope of the question presented and does not warrant this Court's review.<sup>10</sup>

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<sup>9</sup> Amicus correctly notes (Br. 34-35) that the government has argued for the interpretation of the law-enforcement proviso reflected in *Orsay* in a handful of appeals as appellee and in other district court litigation. The Solicitor General has now concluded after review of the matter that *Orsay*'s holding is incorrect and does not reflect a permissible reading of the statutory text.

<sup>10</sup> If petitioner had sued the relevant BOP officers in their individual capacities, the Attorney General could have made a Westfall Act certification that the officers were acting within the scope of their employment at the time of the alleged incident, based on his determination that the incident alleged did not actually occur but supposedly arose while the officers were on duty. See *Osborn v. Haley*, 549 U.S. 225, 247-248 & n.12 (2007). Such a certification—which substitutes the United States for the individual defendants, *id.* at 230, 241—is consistent with the contention that, if the alleged incident had occurred, the officers who participated would not have been acting in the scope of their employment.



Because the government has not previously argued that no BOP officer would have been acting within the scope of his employment if the officers had sexually assaulted petitioner, neither the district court nor the court of appeals addressed the issue. They rested their judgments instead on an independent (and the government now believes erroneous) ground. J.A. 96, 103-104. The question presented as formulated by this Court responded to the Third Circuit's decision and similarly assumed that the officers here were "acting within the scope of their employment." See U.S. Br. I (reproducing question). Because the scope-of-employment issue was never "addressed by the Court of Appeals" and lies "outside the scope of the question presented," this Court should decline to entertain that issue now. *Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 457 (2009); see *Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011) (This is "a court of review, not of first view.") (citation omitted); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (Although "a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below."). Review is particularly unwarranted because the issue turns on Pennsylvania law. See 28 U.S.C. 1346(b)(1); *Xue Lu v. Powell*, 621 F.3d 944, 948 (9th Cir. 2010); *Merlonghi v. United States*, 620 F.3d 50, 54 (1st Cir. 2010); Amicus Br. 56. Such issues rarely merit review, even when they have been passed upon below. Cf. *Maynard v. Cartwright*, 486 U.S. 356, 360 (1988) ("We normally defer to courts of appeals in their interpretation of state law.").

Amicus contends (Br. 55-56) that the scope-of-employment requirement is "jurisdictional" because it is a condition of the FTCA's jurisdictional grant and, as

such, this Court has an obligation to address the question. That is incorrect. Assuming that the scope-of-employment requirement “define[s] the extent of the [district] court’s jurisdiction,” *United States v. Mottaz*, 476 U.S. 834, 841 (1986), Section 2680(h)’s intentional-tort exception, which the Third Circuit applied here, is a requirement cut from the same cloth. See Amicus Br. 26 n.8 (making this argument); see, e.g., *Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012); *Mundy v. United States*, 983 F.2d 950, 952 (9th Cir. 1993). Because “there is no unyielding jurisdictional hierarchy” requiring this Court to resolve one jurisdictional ground before another, the Court may reverse the court of appeals’ judgment on intentional-tort-exception grounds and remand for further proceedings without resolving other potential defects, like scope of employment. *Lance v. Coffman*, 549 U.S. 437, 438-439 & n.\* (2007) (per curiam) (explaining analogous reversal of jurisdictional dismissal) (citation omitted); cf. *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (“[J]urisdiction is vital only if the court proposes to issue a judgment on the merits.”) (brackets in original) (citation omitted). That is the appropriate disposition here.

\* \* \* \* \*

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
Solicitor General

FEBRUARY 2013

**AMICUS  
CURIAE  
BRIEF**

No. 11-10362

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In the  
**Supreme Court of the United States**

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KIM MILLBROOK,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit**

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**BRIEF OF COURT-APPOINTED *AMICUS CURIAE*  
IN SUPPORT OF THE JUDGMENT BELOW**

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## **QUESTION PRESENTED**

Whether 28 U.S.C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of Federal law."

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## STATUTORY PROVISION INVOLVED

The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–2680, waives the sovereign immunity of the United States for state-law torts committed by federal employees acting within the scope of their employment. The FTCA, however, excludes most intentional torts from that waiver of immunity. *Id.* § 2680(h). In 1974, Congress consented to an additional waiver of immunity when it added the law-enforcement proviso to § 2680(h) to limit that exclusion:

*Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.*

## STATEMENT

1. Petitioner Kim Millbrook is a federal prisoner who alleges that he was sexually abused by three employees of the Bureau of Prisons. Petitioner's allegations are as follows: On March 4, 2010, Correctional Officer Pealer brought petitioner to a

basement holding cell. Pealer then returned with two other guards, Lieutenant Edinger and Correctional Officer Gimberling. Edinger applied hand restraints to petitioner while Gimberling "posted up by the door as if guarding it." J.A. 71. Pealer and Edinger forced petitioner to his knees and Edinger put petitioner in a chokehold. Pealer then forced petitioner to perform oral sex. Afterwards, the guards threatened to kill petitioner if he told anyone what had happened. J.A. 72.

Petitioner reported the alleged assault to prison officials. The Department of Justice's Office of the Inspector General conducted an investigation and concluded that petitioner's allegations could not be substantiated. J.A. 32.

2. a. After exhausting administrative remedies, petitioner filed a *pro se* suit against the United States in the U.S. District Court for the Middle District of Pennsylvania. Petitioner alleged that prison officials committed "negligence in failing to exercise reasonable care to protect" him with the result that he "suffered physical injury, specifically was sexually assaulted and battered." J.A. 9.

The government moved to dismiss or for summary judgment, contending that petitioner's complaint was barred by 28 U.S.C. § 2680(h)'s exclusion of claims arising out of assault and battery. J.A. 54, 57. The government acknowledged that the law-enforcement proviso cut back on § 2680(h)'s exclusion and stated that "[t]here is no dispute that . . . correctional officers are law enforcement officers." J.A. 54. Nonetheless, consistent with positions it had taken in numerous other FTCA cases, and in reliance

on *Pooler v. United States*, 787 F.2d 868 (3d Cir. 1986), the government argued that the suit was barred because the alleged torts “did not occur during the course of an arrest, search, or seizure.” J.A. 54. The district court agreed, concluding that petitioner’s suit failed because “the alleged assault did not transpire during one of the enumerated acts recognized under *Pooler*.” J.A. 96.

b. The Third Circuit summarily affirmed without briefing. The court noted that *Pooler* had “limited claims that arise under § 2680(h) to cases in which an intentional tort is committed by a law enforcement or investigative officer while executing a search, seizing evidence, or making arrests for violations of federal law.” J.A. 103. Because petitioner did not allege conduct occurring in the course of one of the enumerated activities, the court concluded that summary judgment was appropriate. J.A. 104.

c. Petitioner sought certiorari, presenting three questions related to his “negligence claim.” Pet. i. The government’s brief in opposition noted that lower courts disagreed over the meaning of the law-enforcement proviso but contended that the petition did “not implicate th[is] division of authority.” BIO 6. This Court granted certiorari and reformulated the question presented. 133 S. Ct. 98 (2012) (mem.). After the government informed the Court that it would not defend the judgment below with respect to the granted question, the Court appointed *amicus* to brief and argue the case in support of the judgment below.

3. a. All employees of the Bureau of Prisons, including but not limited to prison guards, have legal

authority to make arrests. That authority, however, is essentially limited to situations where BOP employees are dealing with non-inmates (such as visitors) or escaped inmates. See 18 U.S.C. § 3050 (BOP employees may make warrantless arrests where “there is [a] likelihood of such person’s escaping before an arrest warrant can be obtained”); 28 C.F.R. § 511.18 (describing BOP policies for arrest of non-inmates).

When prison guards or other BOP employees are dealing with already-incarcerated prisoners, arrest authority is unnecessary, because incarceration itself imposes “a baseline set of restraints” on prisoners’ “freedom of movement.” *Maryland v. Shatzer*, 130 S. Ct. 1213, 1224 (2010). Vis-à-vis inmates, prison guards’ function is not to investigate violations of and enforce federal law, but rather “to ensure discipline and security” within the prison. *United States v. Comstock*, 130 S. Ct. 1949, 1958 (2010).

b. Federal law clearly and categorically prohibits BOP guards from sexually assaulting prisoners. 18 U.S.C. §§ 2241–2244. BOP policy prohibits all sexual contact with inmates, whether or not force is used. BOP Program Statement No. 3420.09, Standards of Employee Conduct, at 8 (“BOP Conduct Standards”).<sup>1</sup> As a result, whatever discretion prison guards may have concerning how to maintain discipline and security within a prison never includes a sexual assault like that alleged by petitioner.

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<sup>1</sup> [http://www.bop.gov/policy/progstat/3420\\_009.pdf](http://www.bop.gov/policy/progstat/3420_009.pdf).

## SUMMARY OF ARGUMENT

The law-enforcement proviso waives the United States' sovereign immunity only for torts committed by federal officers acting in their capacity as "investigative or law enforcement officers"—*i.e.*, torts arising out of searches, seizures of evidence, arrests, and closely related exercises of investigative or law-enforcement authority. Because the torts alleged here do not arise from such activities, sovereign immunity bars petitioner's suit. Alternatively, the Court can affirm the judgment below on the ground that the alleged tortfeasors were not acting within the scope of their employment.

I.A.1. Petitioner reads the law-enforcement proviso to waive sovereign immunity whenever the alleged tortfeasor possesses some investigative or law-enforcement authority, regardless of whether the alleged tort is at all connected to an exercise of that authority. That status-based reading, however, is not the only plausible reading of the proviso. A better reading is that the proviso applies only when the tortfeasor acts in an investigative or law-enforcement *capacity*—*i.e.*, when he is exercising his investigative or law-enforcement authority. This conduct-based reading accords with principles of common usage, under which statements referring to persons by their status are often implicitly limited to situations where the person acts in the relevant capacity. Courts, including this Court, routinely follow that rule when interpreting statutes. See, *e.g.*, *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) (an employer is a "fiduciary" under the Employee Retirement Income Security Act only when it is "acting as a fiduciary").



2. A conduct-based reading is far more consistent with common sense. Petitioner's status-based reading would produce several anomalous results: First, the proviso would make the United States financially responsible for law-enforcement officers' intentional torts having nothing to do with their law-enforcement duties (such as workplace torts) but not for identical torts committed by other federal employees. Second, the proviso would make the United States liable for intentional torts of a vast array of employees who possess search or arrest authority on paper but whose jobs rarely if ever require them to exercise that authority—including the thousands of employees who interact with prisoners on a daily basis. Congress surely did not intend these results. That the government feels the need to try to mitigate these results through a wholly atextual interpretation of who qualifies as an "investigative or law enforcement officer"—an interpretation that does violence to the statutory text *and* produces anomalous outcomes—confirms that petitioner's reading cannot be right.

3. The proviso's legislative history likewise makes clear that Congress was focused on providing a remedy for the abusive exercise of law-enforcement authority. There is no indication that any member of Congress contemplated that the proviso would waive sovereign immunity as broadly as petitioner argues or that it would create a new avenue for litigation by federal prisoners against their jailers.

B. It is thus unsurprising that numerous lower courts, including not only the Third but also the Fifth and Ninth Circuits, have interpreted the proviso as



limited to law-enforcement activities. The real outlier is the Fourth Circuit, which alone has held that the proviso is triggered by the mere possession of law-enforcement authority unrelated to the alleged tort. The government, too, has long championed a conduct-based reading.

C. Limiting the proviso's reach to torts connected with an exercise of law-enforcement authority does not negate the statutory references to abuse of process and malicious prosecution. To the contrary, both of those torts can and often do arise out of searches, seizures of evidence, or arrests.

D. The Court need only find this conduct-based reading plausible in order to affirm. The proviso is a waiver of sovereign immunity and as such must be strictly construed in favor of the sovereign. This principle protects the separation of powers by ensuring that only Congress, and not the Executive, can open the federal purse-strings. Although the Court has cautioned against interpreting *exceptions* to the FTCA's waiver of immunity too broadly, the law-enforcement proviso is not such an exception; rather, it is itself a waiver of immunity, to which normal interpretive principles apply.

E. If the Court believes that it cannot square a conduct-based reading with the statutory text, it should still construe the proviso in that manner under the absurdity doctrine. The Court interprets statutes against their literal meaning when necessary to avoid absurd results, particularly absurd results that also run counter to important constitutional values. Here, the Court should be especially willing to construe the proviso to avoid

results that Congress could not conceivably have intended in light of the constitutionally rooted rule against finding unintended waivers of sovereign immunity.

II. Properly understood, the law-enforcement proviso does not waive sovereign immunity under the facts here. Petitioner's guards were not exercising any of the specified investigative or law-enforcement authorities when the alleged assault occurred. Nor were they engaged in any closely related activities. They were not acting in an "investigative or law enforcement" capacity at all, but rather were acting in a security capacity vis-à-vis an already-incarcerated inmate.

III. In the alternative, the judgment below can be affirmed on the ground that the guards were not acting within the scope of their employment. Under Pennsylvania law, acts of deliberate sexual abuse like those alleged by petitioner do not fall within a prison guard's scope of employment. To the contrary, Pennsylvania courts have not hesitated to hold as a matter of law that employees' outrageous and dangerous actions, including sexual and physical assaults, do not satisfy scope-of-employment requirements.

## ARGUMENT

### **I. The Law-Enforcement Proviso Waives Sovereign Immunity Only For Torts Committed By Officers Acting In An “Investigative Or Law Enforcement” Capacity.**

#### **A. The Proviso Is Best Read To Make Its Applicability Turn On Conduct, Not On The Tortfeasor’s Status.**

##### **1. A Conduct-Based Reading Is Consistent With The Statutory Text.**

Petitioner reads the law-enforcement proviso to waive sovereign immunity whenever the alleged tortfeasor possesses some investigative or law-enforcement authority, regardless of whether the alleged tort is in any way connected to an exercise of that authority. That reading, which makes the applicability of the waiver turn on the tortfeasor’s status rather than his relevant conduct, has the superficial appeal of simplicity. But as this Court explained in another FTCA case:

The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

*Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

Here, too, it would be a mistake to focus solely on the proviso's "words in isolation." Textually plausible though petitioner's reading is, a better reading takes account of the "purpose and context of the statute," the proviso's legislative history, and underlying constitutional values. Correctly understood, the proviso waives sovereign immunity only when the tortfeasor acts in an investigative or law-enforcement capacity—i.e., when he is exercising his investigative or law-enforcement authority—and not merely whenever the tortfeasor happens to possess some investigative or law-enforcement authority having nothing to do with the case. In other words, the statutory phrase "acts or omissions of an investigative or law enforcement officer" should be read as containing the implied caveat, "acts or omissions of an investigative or law enforcement officer *acting as such*."

This implied caveat is consistent with the principle that courts interpret statutory language to accord with customary English usage. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1706–07 (2012). In common usage, a statement referring to persons by their role or status is often understood as implicitly limited to situations where the person acts in the role described (e.g., "a judge should be impartial"). For example, it is a truism that "[p]rosecutors enjoy absolute immunity from damages liability," *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 736 (1980), but that broad statement contains the implicit caveat that a prosecutor must "act[] within the scope of his

prosecutorial duties,” *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976), or “in a prosecutorial capacity,” *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985), for absolute immunity to apply—it does not mean that prosecutors can never be held liable merely by virtue of their *status* as prosecutors, see *Buckley v. Fitzsimmons*, 509 U.S. 259, 273–75 (1993).

Consistent with this common usage, courts often read statutory references to a role or status as limited to actions taken in the relevant capacity, even when the literal statutory text could be read to extend more broadly. A good example comes from the Employee Retirement Income Security Act. ERISA imposes certain obligations on plan “fiduciaries” and provides that “a person is a fiduciary with respect to a plan to the extent,” *inter alia*, “he has any discretionary authority or discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A). Although one could read this provision to mean that an employer’s mere possession of “discretionary authority” or “discretionary responsibility” related to plan administration is enough to make the employer a fiduciary, this Court has not read it that way. Instead, the Court has held that an employer is a “fiduciary” only when it was “acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.” *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Even when an employer possesses plan-administration authority, its “fiduciary duties under ERISA are implicated only when it acts in [its administrative] capacity,” which “depends upon the nature of the function performed.” *Beck v. PACE Int’l Union*, 551 U.S. 96, 101 (2007);



see also *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996).

Other courts have likewise read statutes that on their face appear to be triggered by status as containing implied limitations based on conduct. For example, provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, governing a "vessel's owner" apply only when a party is "acting in its capacity as a vessel owner" and not "as a party who incidentally utilizes a vessel." *Wagner v. McDermott, Inc.*, 79 F.3d 20, 23 (5th Cir. 1996). Similarly, provisions of the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.*, that regulate "common carriers" apply only when parties are "acting as common carriers," *United States v. Tucor Int'l, Inc.*, 238 F.3d 1171, 1177 (9th Cir. 2001), and do not apply to common carriers' "non-common carriage activities," *Am. Ass'n of Cruise Passengers, Inc. v. Carnival Cruise Lines, Inc.*, 911 F.2d 786, 791–92 (D.C. Cir. 1990).<sup>2</sup>

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<sup>2</sup> Cf. *Abdallah v. Callender*, 1 F.3d 141, 144 (3d Cir. 1993) (assuming that statute restricting "action[s] against a health care provider" was limited to "actions against a health care provider acting in that capacity"); *Transamerica Corp. v. Moniker Online Servs., LLC*, 672 F. Supp. 2d 1353, 1365, 1368 (S.D. Fla. 2009) (Anticybersquatting Consumer Protection Act provision creating safe harbor for "domain name registrar[s]" applies only to those "acting solely in their capacity as registrars"); *People v. Canale*, 658 N.Y.S.2d 715, 717 (App. Div. 1997) (statute punishing deceit by "an attorney" applies only to "actions by an attorney acting in his or her capacity as an attorney").



Accordingly, it is consistent with ordinary usage and precedent to construe the phrase “acts or omissions of investigative or law enforcement officers” as limited to situations where the tortfeasor acts in an “investigative or law enforcement” role. Moreover, the proviso reinforces this contextual reading and makes it readily workable in practice by specifying “investigative or law enforcement” functions: executing searches, seizing evidence, and making arrests. A federal employee who is not engaged in one of these three enumerated functions or in closely related activities is not acting as an “investigative or law enforcement officer” for purposes of § 2680(h), even if he happens to possess authority to perform those functions.

## **2. This Reading Best Accords With Common Sense.**

Interpreting the law-enforcement proviso so that the United States’ liability for intentional torts is triggered by law-enforcement conduct—searches, seizures of evidence, arrests, and closely related activities—best accords with common sense. Unlike this conduct-based interpretation, petitioner’s status-based reading of the proviso would produce at least two types of anomalies that Congress could not have intended.

1. Under petitioner’s view, federal law-enforcement officers would trigger U.S. liability with intentional torts that have nothing to do with their law-enforcement functions—even though those *same* torts would be excluded if committed by other federal employees under identical circumstances. Most notably, the proviso would make the United States’

liability for workplace torts committed by one co-worker against another depend on whether the tortfeasor had the legal authority to search, seize evidence, or make arrests. This “would create an arbitrary distinction between investigative and law enforcement officers and other federal employees, and produce the bizarre result that suit lies against the United States when one federal law enforcement officer punches another in the office, but not when other federal employees engage in the same conduct.” *Orsay v. U.S. Dep’t of Justice*, 289 F.3d 1125, 1134 (9th Cir. 2002); see also *Ignacio v. United States*, 674 F.3d 252, 258 (4th Cir. 2012) (Diaz, J., concurring) (this “inconsistent treatment of investigative and law enforcement officers and other federal employees may well be arbitrary and unreasonable”).<sup>3</sup>

It is inconceivable that Congress, in deciding which victims of intentional torts by federal employees merited compensation from the Treasury, would have thought that a victim of a workplace tort committed by an employee with search/seizure/arrest

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<sup>3</sup> The arbitrariness is even more pronounced than petitioner acknowledges. The Federal Employees’ Compensation Act, 5 U.S.C. § 8101 *et seq.*, provides the exclusive remedy for claims “with respect to the injury or death” of federal employees. *Id.* § 8116(c). Thus, employees who are actually “injured” or killed by law-enforcement officer co-workers might be FECA-barred from suing under the FTCA, while those who are victims of similar torts but who have not suffered an “injury” as defined by FECA could invoke the FTCA. Cf. *Gill v. United States*, 471 F.3d 204, 208–09 (1st Cir. 2006) (noting disagreement in lower courts over whether non-physical injuries are cognizable under FECA).

powers was somehow more deserving of compensation than a victim of the *same* tort committed by an employee not thus empowered. There is no rational reason why the availability of an FTCA claim should depend on what legal powers the tortfeasor happens to possess in aspects of his job wholly unrelated to the tort.

In search of an explanation for this bizarrely disparate treatment, petitioner echoes Judge Diaz's suggestion that this result, while seemingly "arbitrary and unreasonable," might nonetheless be a way of "hold[ing] law enforcement officers to a higher standard . . . given the important trust society places in them." Br. 38 (quoting *Ignacio*, 674 F.3d at 258 (Diaz, J., concurring)). Petitioner appears to be suggesting that Congress may have wanted to "hold law enforcement officers to a higher standard" by providing for some punishment or deterrence of law-enforcement officers (but not other federal employees) for intentional torts. But petitioner's interpretation of the law-enforcement proviso does nothing of the sort.

The law-enforcement proviso imposes liability on the federal Treasury—not on the tortfeasor law-enforcement officer whose conduct gives rise to the liability, and not even on his employing agency. FTCA judgments and settlements are paid out of a permanent and indefinite appropriation known as the "judgment fund," not out of the limited funds appropriated on an annual basis for the agencies that employ law-enforcement officers. See 31 U.S.C. § 1304; *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2193 n.8 (2012). As a result, neither federal

law-enforcement officers individually nor the agencies that employ them have any concrete incentive to try to avoid FTCA liability. Indeed, this Court in *Carlson v. Green*, 446 U.S. 14 (1980), expanded the *Bivens* remedy precisely because suits against individual officers are “a more effective deterrent than the FTCA remedy against the United States.” *Id.* at 21; see also *id.* at 21 n.8 (expressing doubt over whether “there exist adequate mechanisms for disciplining federal employees” whose misconduct leads to FTCA judgments).

Thus, while it may be plausible in the abstract that Congress might wish to hold law-enforcement officers to a higher standard, that is not what Congress did in the law-enforcement proviso. Even under petitioner’s interpretation, the proviso does not “hold” officers to any “standard” whatsoever. If anything, extending an FTCA remedy could *undermine* deterrence of law-enforcement officers by encouraging injured plaintiffs to sue the United States under the FTCA rather than the officer personally under *Bivens*.<sup>4</sup> For the same reason, petitioner’s *amici* have it backwards in arguing that the Court should adopt a broader reading of the proviso in order to deter sexual assault in prisons.

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<sup>4</sup> Most courts have held that, even where the victim sues initially under both the FTCA and *Bivens*, the FTCA’s “judgment bar,” 28 U.S.C. § 2676, bars the *Bivens* claim once there is a judgment on the FTCA claim, even if that judgment is *against* the plaintiff. See *Denson v. United States*, 574 F.3d 1318, 1334 n.50 (11th Cir. 2009) (collecting cases). Where it is clear at the outset that § 2680(h) precludes an FTCA claim, the victim presumably will be more likely to sue only under *Bivens*.

See Lewisburg Prison Project Br. 4–8; Lambda Legal Br. 15–30. Additional measures may well be needed to punish and deter sexual violence in prisons, but adopting a broader reading of the proviso will not achieve that worthy goal.

In short, the anomalous results described above cannot be explained away as the price of Congress's effort to hold law-enforcement officers to a higher standard. These anomalous results should make this Court hesitant to accept petitioner's interpretation. *Cf. Dolan*, 546 U.S. 488–89 (rejecting a proposed interpretation of another FTCA exception, § 2680(b), because that reading “would yield anomalies, perhaps making liability turn on whether a mail sack causing a slip-and-fall was empty or full, or whether a pedestrian sideswiped by a passing truck was hit by the side-view mirror or a dangling parcel”).

2. Creating arbitrary distinctions between similarly situated victims of federal workplace torts is not the only bizarre result that petitioner's reading would produce. It would also make taxpayers liable for torts entirely unrelated to law-enforcement activity committed by untold numbers of federal employees who technically meet the status-based definition of “investigative or law enforcement officers.” Many federal employees possess one of the proviso's enumerated authorities but rarely if ever exercise that authority. These individuals qualify as “investigative or law enforcement officers” under the plain language of the definition, but they generally do not act as such. There is no reason to believe that Congress intended to make the Treasury liable for their conduct not involving the kind of law-



enforcement activity that Congress was concerned about when enacting the proviso. Yet that is precisely the effect of petitioner's reading.

For example, "any justice or judge of the United States," and "any United States magistrate judge," is authorized to make arrests. 18 U.S.C. § 3041. If it is unlikely to begin with that Congress intended to make the Treasury pay for intentional torts committed by federal judges, it is beyond fanciful to imagine that Congress intended to achieve that result by relying on the fortuity that judges formally have arrest powers. For this very reason, the Ninth Circuit rejected the status-based interpretation of the proviso:

We can accept the argument that magistrates and judges are "investigative or law enforcement officers" for purposes of § 2680(h) when actually apprehending a suspect. We are confident, however, that Congress intended § 2680(h) to apply only when the federal official acts in his or her investigative or law enforcement capacity.

*Arnsberg v. United States*, 757 F.2d 971, 978 n.5 (9th Cir. 1985).

Numerous other federal employees have arrest powers. For example, "[a]ll persons employed in the Forest Service"—more than 30,000 individuals<sup>5</sup>—may make arrests. 16 U.S.C. § 559. So can soldiers who serve as guards or sentries at military facilities.

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<sup>5</sup> [http://www.fs.fed.us/fsjobs/jobs\\_FAQs.shtml](http://www.fs.fed.us/fsjobs/jobs_FAQs.shtml).



See *Holian v. United States*, Nos. 06-2404, -2405, 2009 WL 2413979 (W.D. La. July 31, 2009).

And, of course, as particularly relevant here, each of the close to 40,000 “officer[s]” and “employee[s] of the Bureau of Prisons”<sup>6</sup> has legal authority to make arrests, 18 U.S.C. § 3050, and thus would qualify as an “investigative or law enforcement officer.” But many BOP employees, and certainly prison guards like the alleged tortfeasors here, interact mainly with prisoners, not with free citizens who can be “arrested.” Their jobs have little or nothing to do with the types of “investigative or law enforcement” activities that Congress was focused on when drafting the proviso.

That disconnect alone should make this Court hesitant to adopt petitioner’s interpretation. And the fact that petitioner’s interpretation would let loose a flood of FTCA claims by prisoners should reinforce that hesitation. In *United States v. Muniz*, 374 U.S. 150 (1963), which first recognized an FTCA cause of action for federal prisoners, the Court stressed that under the pre-proviso version of § 2680(h), “the government is not liable for the intentional torts of its employees, for which prisoners might be especially tempted to initiate retributive litigation.” *Id.* at 163 (citation omitted). If Congress, in amending § 2680(h) to add the proviso, wished to expand the opportunities for federal prisoners to bring possibly “retributive litigation,” Congress surely would have made its intention more explicit.

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<sup>6</sup> <http://www.bop.gov/about/facts.jsp>.

In *Dolan*, the government raised the “specter of frivolous slip-and-fall claims inundating” the Postal Service as a reason to adopt a broad reading of a different FTCA exception in § 2680(c). 546 U.S. at 491. The Court recognized that “avoiding exposure of the United States to liability for excessive or fraudulent claims” was “a principal aim of the FTCA exceptions.” *Ibid.* (quoting *Kosak v. United States*, 465 U.S. 848, 858 (1984)). The Court nonetheless ruled for the plaintiff in that case because liability for loss of property “is a risk shared by any business that makes home deliveries” and thus “ordinary protections against frivolous litigation . . . suffice[d].” *Ibid.*

Here, however, the threat of frivolous claims by prisoners is quite real, given the serious potential for “retributive litigation” that this Court has previously recognized. *Muniz*, 374 U.S. at 163.<sup>7</sup> And that is a particularly unique risk borne by the Treasury and not shared by private defendants. For these very reasons, Congress determined that “ordinary protections against frivolous litigation” do *not* suffice when it comes to prisoner suits and created special, additional protections in this unique context in the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). One of petitioner’s *amici* argues that this Court should conclude that § 2680(h) provides a remedy for federal prisoners abused by guards because the FTCA’s exhaustion requirement is less onerous than

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<sup>7</sup> As the government notes (Br. 2 & n.1), petitioner has filed numerous lawsuits making false allegations of misconduct by BOP staff.

the PLRA's. See *Lewisburg Prison Project* Br. 19–21. But far from being a reason to interpret the law-enforcement proviso broadly, that argument suggests that Congress did *not* envision that the proviso would allow prisoners to bring intentional-tort claims on the rationale that their jailers qualify as “investigative or law enforcement officers.”

And those are the implications only of focusing on the vast array of federal employees who possess the arrest power included in the definition of “investigative or law enforcement officer.” The anomalous and implausible nature of petitioner’s view of Congress’s intent becomes even clearer when one also considers the enumerated search power. Numerous employees have the power to enter premises to verify compliance with federal regulations, including agents of the Occupational Safety and Health Administration, see 29 U.S.C. § 657; *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978), and the Environmental Protection Agency, see 42 U.S.C. § 9604(e)(3). Such administrative inspections are searches. See *v. City of Seattle*, 387 U.S. 541, 543 (1967). The proviso could also reach federal supervisors who are empowered to conduct warrantless workplace searches of employees’ offices, see *City of Ontario v. Quon*, 130 S. Ct. 2619, 2632–33 (2010), as well as federal employees who are authorized to carry out drug tests, which this Court has held are searches, see *Nat’l Treas. Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989).

In short, petitioner’s interpretation would generate a host of anomalies. It would permit FTCA suits for workplace disputes between law-

enforcement officers having nothing to do with the exercise of any law-enforcement authority, while identical suits arising out of workplace disputes between other federal employees would be barred. It would make the taxpayers liable for intentional torts committed by tens if not hundreds of thousands of federal employees who qualify as "investigative or law enforcement officers" but who rarely if ever exercise the law-enforcement authorities that Congress was focused on in enacting the proviso. And it would open the door for prisoners to burden the government with FTCA claims accusing their jailers of intentional torts. There is quite simply not a shred of evidence that Congress intended the proviso to have these effects.

3. The government tries to avoid some of the stranger results just described by advancing a narrow interpretation of who is an "investigative or law enforcement officer." But its novel reading is wholly at odds with § 2680(h)'s definition of that term. "[I]n the government's view," that defined term should be limited to officers who conduct "traditional law-enforcement functions." Gov't Br. 31. "Other federal employees who conduct inspections and non-evidentiary seizures of a regulatory or administrative nature outside of traditional law-enforcement contexts are not properly included . . . ." *Ibid.*

This limiting construction has zero basis in the statutory text. The proviso defines "investigative or law enforcement officer" as "*any* officer of the United States who is empowered by law to execute searches, to seize evidence, *or* to make arrests for violations of Federal law." 28 U.S.C. § 2680(h) (emphases added).

Consistent with its use of the all-embracing "any" and the disjunctive "or," which makes clear that an employee meets the definition if he possesses even one of the three enumerated authorities, the statutory definition contains not the slightest suggestion that it is or can be limited to an implicit and undefined category of "traditional" law-enforcement officers.

The government's textualism is selective. On the one hand, the government confessed error with respect to whether the proviso applies even when law-enforcement officers are not engaged in the activities enumerated in the proviso. The text is plain and ties our hands, it now explains, abandoning a judgment in its favor and the position it took in numerous cases. See Br. 18-22; *infra* Part I.B. Yet at the same time the government insists on an unnecessarily literalistic reading of the proviso's first sentence, it presses an utterly atextual reading of the second.

The government presumably believes its limiting construction is necessary to avoid some of the untoward consequences that flow from the interpretation of the proviso that it now embraces: if everything an "investigative or law enforcement officer" does within the scope of employment is within the proviso even if totally unrelated to the exercise of law-enforcement functions, then the need arises to limit the taxpayers' exposure by narrowing who qualifies as an "investigative or law enforcement officer." But the government's redefinition of that term fails to rationalize the statute and produces its own set of anomalies.



In the government's view, the United States can *always* be sued for the enumerated intentional torts when they are committed by officers who fall into the "traditional" category, even if those torts have nothing to do with investigation or law enforcement. Yet the United States can *never* be sued for these torts when they are committed by non-"traditional" law-enforcement officers—even if the torts occur in the course of the specific investigative or law-enforcement activities enumerated in the proviso. That is, the property owner who is falsely imprisoned and battered by an OSHA inspector during an administrative inspection will have no remedy, while the DEA agent who is assaulted by his fellow agent in a workplace dispute will be able to obtain damages from the Treasury. This result has nothing to recommend it. It is neither faithful to the statutory text and congressional intent nor sensible as a policy matter. Indeed, compared to the view of the court below, the government's new reading manages to do more violence to the statutory text while producing less rational results.

The government's new interpretation of the definition of "investigative or law enforcement officer" is all the more mystifying because it would appear to support affirmance of the judgment below, and yet the government is seeking reversal. Prison guards are far from "traditional" law-enforcement officers. Unlike, say, FBI or DEA agents, BOP guards rarely if ever need to make arrests; the prisoners they guard are already incarcerated. BOP employees' authority to make arrests is directed towards non-inmate visitors to prisons and escaped inmates. 18 U.S.C. § 3050; 28 C.F.R. § 511.18; see also *United*



*States v. Watson*, 423 U.S. 411, 416 & n.5 (1976) (compared to many federal officers, prison guards are “subject to a more restrictive statutory standard” in making arrests (citing 18 U.S.C. § 3050)). That arrest authority is at best incidental to guards’ main job of providing security for already-incarcerated inmates. Cf. *De villier v. United States*, No. 09-263, 2010 WL 476722, at \*5 (W.D. La. Feb. 10, 2010) (proviso did not apply because prison guard who shot inmate was “simply acting as a prison security officer” and not in an investigative or law-enforcement capacity).

The court below accepted that the alleged tortfeasings prison guards were “investigative or law enforcement officers,” but held petitioner’s suit barred because the guards were not engaged in the law-enforcement activities enumerated in the proviso. But it is not happenstance that the guards did not engage in those enumerated law-enforcement activities in this case; as prison guards, they rarely if ever would have occasion to do so and thus hardly can be described as “traditional” law-enforcement officers. If the government is correct that the proviso is limited to conduct of “traditional” law-enforcement officers, then the result should be the same: petitioner’s suit is not within the proviso.

A final mystery in the government’s new definition of “investigative or law enforcement officer” is that the government insists that “[t]he meaning of ‘investigative or law enforcement officer’ . . . is not a question properly before this Court.” Br. 32. That is hard to reconcile with the government’s volunteering a lengthy explanation of its interpretation of that term. It is also plainly wrong.

To be sure, the government did not dispute below that petitioner's guards qualified as "investigative or law enforcement officers" or suggest that that status should be reserved for "traditional" officers. But neither did petitioner suggest at any point that *Pooler* should be overturned. The Court, when it reformulated the question presented, asked whether the FTCA waives sovereign immunity "for the intentional torts of *prison guards*." 133 S. Ct. 98 (2012) (mem.) (emphasis added). The question presented thus indisputably includes whether prison guards are "investigative or law enforcement officers." Nor could the Court sensibly decide how to interpret the phrase "acts or omissions of investigative or law enforcement officers" without also considering who qualifies as an "investigative or law enforcement officer." These questions are inextricably intertwined.<sup>8</sup>

### **3. Legislative History Also Militates In Favor Of This Reading.**

The legislative history of the law-enforcement proviso confirms that the phrase "acts or omissions of investigative or law enforcement officers" must be limited to conduct related to searches, seizures of evidence, and arrests.

That history, though sparse, shows that Congress believed it was waiving immunity only for

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<sup>8</sup> Moreover, because the law-enforcement proviso is a limited waiver of sovereign immunity, its scope is jurisdictional and the government's concession cannot be dispositive. Cf. *FDIC v. Meyer*, 510 U.S. 471, 477 (1994).

torts committed in the course of investigative or law-enforcement activity. The Report of the Senate Committee on Government Operations, which recommended the amendment that became the proviso, stated that the amendment was a response to the Collinsville no-knock raids. See, *e.g.*, S. Rep. No. 93-588 (Nov. 29, 1973), reprinted in 1974 U.S.C.C.A.N. 2789, 2791 ("after the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action against . . . the Federal Government"); *ibid.* (the proviso "waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*," *i.e.*, unlawful search and arrest).

Petitioner and the government emphasize language in the report stating that the proviso would apply to "any case" in which a law-enforcement officer committed one of the enumerated torts while acting within the scope of employment. Pet. Br. 27; Gov't Br. 28. But they take this statement out of context. Here is the passage in which this statement appears:

The whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure

the public through search[es] and seizures that are conducted without warrants or with warrants issued without probable cause. However, the Committee's amendment should not be viewed as limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.

S. Rep. No. 93-588, reprinted in 1974 U.S.C.C.A.N. at 2791. In context, it is clear that the "any case" language simply meant that the proviso's waiver encompassed common-law torts as well as constitutional violations. The government previously recognized this point. See Gov't Br. 15 n.3, *Ignacio*, 674 F.3d 252 (No. 10-2149), 2011 WL 568765 ("In making this statement, Congress was merely attempting to convey that the proviso did not apply only when a tort would rise to the level of a constitutional violation . . . but even to torts of non-constitutional dimensions."). Nothing in the report suggests that the Committee intended "acts or omissions of investigative or law enforcement officers" to be interpreted to sweep within its scope torts where the officer was not acting in a law-enforcement capacity at all. To the contrary, the sentence before the one from which petitioner and the government pluck "any case" shows that Congress was focused on "search[es] and seizures."

The discussion of the law-enforcement proviso in the House confirms that Congress did not intend to waive immunity as broadly as petitioner argues.

There was a spirited debate over the Senate committee's amendment tacking the proviso onto H.R. 8245, a bill that primarily concerned a reorganization of the Immigration and Naturalization Service. Much of the debate centered on whether the Senate's amendment was procedurally improper. See, *e.g.*, 120 Cong. Rec. 5286 (Mar. 5, 1974) (statement of Rep. Donohue) (arguing that Senate Committee on Government Operations lacked jurisdiction to amend the FTCA). There was also discussion of the proviso's substantive merits, however. See, *e.g.*, *id.* at 5287 (discussion of proviso's potential effect on criminal trials due to FTCA's judgment bar). Yet despite that debate, not one Representative even suggested the possible criticism that the bill would create liability for a large number of torts that have no connection to law enforcement—let alone create a new cause of action for federal prisoners. This is likely because none of the Representatives thought the proviso was that broad.

Given the weighty constitutional values at stake in interpreting waivers of sovereign immunity, see *infra* Part I.D, this Court should hesitate before accepting a reading that would authorize payments from the Treasury in circumstances where there is no reason to believe that Congress contemplated that such a remedy would exist. Instead, the Court should interpret the proviso in light of what Congress plainly was trying to accomplish in responding to the Collinsville raids and should hold that the proviso applies only where an “investigative or law enforcement officer” acts as such.



**B. Many Lower Courts Have Recognized  
The Wisdom Of This Reading, As Has  
The Government In Past Cases.**

Petitioner and the government assert that the Third Circuit is “alone among the courts of appeals” in its interpretation of § 2680(h). Pet. Br. 4; see also Gov’t Br. 29. The picture they paint, however, is incomplete.

The reality is that the interpretation favored by both petitioner and the government today—which imposes no limitation (other than the scope-of-employment requirement) on the “acts and omissions of an investigative or law enforcement officer” that can trigger U.S. liability—has been rejected by many lower courts and has been embraced by only a single court of appeals. See *Ignacio*, 674 F.3d 252. Many of the lower courts that have considered the question, including not only the Third Circuit but also the Fifth and Ninth Circuits, have concluded that the “acts and omissions” falling within the proviso do not include all within-scope conduct by individuals meeting the proviso’s definition of “investigative or law enforcement officers” but must be limited to “investigative or law enforcement” activities.

For example, in *Orsay*, the Ninth Circuit found the law-enforcement proviso “reasonably susceptible of an interpretation . . . that limits the government’s liability to torts committed in the course of investigative or law enforcement activities” and adopted that interpretation in light of the principle that waivers of sovereign immunity must be unequivocal. 289 F.3d at 1134. Thus, the court concluded that the proviso did not apply to a U.S.



Marshals Service employee who allegedly assaulted two colleagues in the workplace, as the plaintiffs did not allege that he committed the assaults “in the context of investigative or law enforcement activities.” *Id.* at 1136. Similarly, in *Cross v. United States*, 159 F. App’x 572 (5th Cir. 2005) (per curiam), the Fifth Circuit held that the proviso did not apply to military police who detained a civilian during a combat training exercise. Although the officers “possessed the power to enforce law and order on the military base,” the proviso did not apply because they were not “acting in an investigative [or law-enforcement] capacity” but rather were “acting in a security capacity,” which “is a combat and not investigative function.” *Id.* at 576.

Other cases reach similar conclusions. See, e.g., *Arnsberg*, 757 F.2d at 978 n.5 (proviso did not apply to magistrate judge who issued improper warrant because, although the magistrate had statutory authority to make arrests, he was not acting “in an investigative or law enforcement capacity” when he issued the warrant); *Murphy v. United States*, 121 F. Supp. 2d 21, 25 (D.D.C. 2000) (proviso did not apply to Secret Service supervisor who allegedly assaulted subordinate in the workplace, as he was not “engaged in investigative or law enforcement activities”); *Emp’rs Ins. of Wausau v. United States*, 815 F. Supp. 255, 259 (N.D. Ill. 1993) (assuming EPA agents had search/seizure/arrest authority, proviso applied to

their conduct only “while they [we]re engaged in investigative or law enforcement activities”).<sup>9</sup>

Some of these courts have disagreed with strictly limiting the covered “investigative or law enforcement activities” to only searches, seizures of evidence, and arrests and nothing else, attributing that limitation to *Pooler*. See, e.g., *Murphy*, 121 F. Supp. 2d at 24 (“*Pooler*’s holding appears unduly narrow . . .”). To begin with, it is debatable whether the Third Circuit really has limited the proviso to conduct occurring only during a search, seizure of evidence, or arrest, excluding even closely related investigative or law-enforcement activity incident to one of those three enumerated acts. Cf. *Matsko v. United States*, 372 F.3d 556, 560 (3d Cir. 2004) (describing *Pooler* as excluding conduct “not within the bounds of an investigation”).

In all events, many of the courts that have disagreed with *Pooler*, though framing their approach in broader language, have reached the same results as would the Third Circuit—results that

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<sup>9</sup> The Seventh Circuit may belong in this category as well. Although it has held that “Section 2680(h) does not require that a law enforcement officer commit the intentional tort while executing a search, seizing evidence, or making an arrest,” it also quoted without disapproval the principle that an action under the proviso “must at a minimum charge the government with wrongdoing based on ‘acts or omissions of investigative or law enforcement officers’ while they are engaged in investigative or law enforcement activities.” *Reynolds v. United States*, 549 F.3d 1108, 1114 (7th Cir. 2008) (quoting *Wausau*, 815 F. Supp. at 259) (emphasis in original)).

petitioner's approach would prohibit.<sup>10</sup> The disagreement between these courts and the Third Circuit should not be exaggerated; it is the Fourth Circuit, the court with which petitioner and the government now agree, that is the outlier here.

The government, too, has long recognized the wisdom of limiting the proviso to investigative and law-enforcement activities. A reader of the government's brief might infer that the notion of limiting the proviso to something less than all within-scope conduct by individuals meeting the definition of "investigative or law enforcement officer" sprang up without any involvement by the government. See Gov't Br. 29. That would be incorrect. The government has repeatedly sought to restrict the proviso to law-enforcement activity. See, e.g., Gov't Br., *Ignacio, supra*, at 14–15 ("Congress has retained sovereign immunity for conduct by law enforcement officers that does not arise out of any law enforcement activity."); Gov't Br. 12–13, *Cross*, 159 F. App'x 572 (No. 04-30930) (successfully arguing that proviso did not apply to military police who, though possessing law-enforcement powers, "were not operating in a law enforcement capacity" at the

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<sup>10</sup> For example, courts in the Fifth and Ninth Circuits have consistently rejected claims where the alleged tortfeasors were not acting in an investigative or law-enforcement capacity. See, e.g., *Lewis v. Napolitano*, No. 11-2137, 2012 WL 274415, at \*4 (E.D. La. Jan. 31, 2012); *Devillier*, 2010 WL 476722, at \*5; *Holian*, 2009 WL 2413979, at \*3; *Lineberry v. United States*, No. 3:08-CV-0597, 2009 WL 763052, at \*8 (N.D. Tex. Mar. 23, 2009); *Costigan v. United States*, No. C06-5425, 2007 WL 2069900, at \*2 (W.D. Wash. July 16, 2007).

time of the alleged tort); Gov't Br. 22–23, *Orsay*, 289 F.3d 1125 (No. 00-16860), 2001 WL 34093295 (successfully arguing that proviso did not apply because “[t]he Third Circuit, as well as a number of lower courts, . . . have limited the law enforcement exception . . . to conduct arising specifically from active law enforcement activities, such as arrest, search, and seizure”); see also Gov't Mot. at 12, *Lineberry v. United States*, No. 3:08-CV-0597, 2009 WL 763052 (N.D. Tex. Mar. 23, 2009), Dkt. 19 (arguing successfully that inmate's allegation that prison staff arranged his assault by another inmate did not come within proviso because alleged misconduct did not occur “during a search, seizure or arrest”).

Indeed, for all the government's protests that *Pooler* fashioned its search/seizure/arrest-only interpretation out of whole cloth, the government appears to have embraced that interpretation long before *Pooler*. In *Sami v. United States*, 617 F.2d 755 (D.C. Cir. 1979), *abrogated on other grounds*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the D.C. Circuit noted that the government had argued in the district court that the proviso was “meant to cover only investigative and law enforcement officers *while engaged in the performance of the duties described in the statutory definition*.” *Id.* at 761 (emphasis added); see *ibid.* (“Since Sims in his role as Interpol liaison did not execute searches, seize evidence, or make arrests for violation of Federal law, the government

argued, claims arising from his performance as Interpol liaison are not covered by the Act.”).<sup>11</sup>

More importantly, it is far from clear that the government now rejects the law-enforcement-activity interpretation adopted by courts such as the Ninth Circuit in *Orsay* and *Arnsberg*, the Fifth Circuit in *Cross*, and the district courts in *Wausau* and *Murphy*. In its brief, the government simply says of the Ninth Circuit’s reading that it, “unlike *Pooler*’s, does not limit the proviso only to those acts or omissions occurring in the course of conducting searches, seizing evidence, or making arrests.” Br. 29 (citing *Orsay*, 289 F.3d at 1133). The government’s failure to criticize the Ninth Circuit’s approach (which was also the government’s approach) is striking. In context, coming after a lengthy critique of *Pooler*’s search/seizure/arrest-only interpretation, the government’s uncritical mention of the Ninth Circuit’s approach seems to suggest approval.

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<sup>11</sup> *Sami* rejected the government’s attempt to limit the proviso to officers’ “actual participation in making arrests or conducting investigations.” 617 F.2d at 764. At the same time, however, lower courts have read *Sami* as being consistent with the law-enforcement-activities interpretation of the proviso, even if inconsistent with *Pooler*’s search/seizure/arrest-only interpretation. See *Murphy*, 121 F. Supp. 2d at 25 (district court bound by *Sami* reading it as limiting the proviso to “abuse[s] in the law enforcement context”); *Wausau*, 815 F. Supp. at 259–60 (“[T]he actual activity that *Sami* held to be within the Section 2680(h) proviso was clearly of the type that is considered as law enforcement in the traditional and commonly understood sense.”).



But the government's position is unclear. If the government continued to adhere to the position that conduct having nothing to do with law-enforcement activity falls outside of the proviso even if engaged in by someone who happens to possess search, seizure, or arrest authority, then the government should still be defending its victory below. The guards' alleged conduct here, after all, had nothing to do with any search, seizure, or arrest, and the guards were performing a security function inside the prison vis-à-vis an already-incarcerated prisoner, not a law-enforcement function at all. This is precisely the argument that the government made, successfully, about military police in *Holian*. See Mem. in Supp. of Gov't Mot. 6–7, *Holian*, 2009 WL 2413979 (Nos. 06-2404, -2405), 2009 WL 1623999 (distinguishing military police's "security function" from their "investigative or law enforcement activities").

Whatever the government's position, the fact remains that numerous lower courts, not just the Third Circuit, have recognized that interpreting § 2680(h) as broadly as petitioner advocates would be unwise and inconsistent with Congress's intent. The Court need not confine the proviso strictly to searches, seizures, and arrests, with even closely related law-enforcement activities excluded, in order to affirm the judgment below. The question in this case, rather, is whether *any* connection to investigative or law-enforcement activity is required. If so, petitioner's suit fails, as the guards were not engaged in investigative or law-enforcement activity at all. See *Wausau*, 815 F. Supp. at 259 (court "need not subscribe to the strict view of the statute that was adopted in *Pooler* to reject Wausau's position



here"). And because petitioner's suit has no connection to any of the three specific "investigative or law enforcement" powers enumerated in the proviso, the Court need not determine precisely how close a connection is required.

**C. This Reading Does Not Negate The Proviso's References To Abuse Of Process And Malicious Prosecution.**

Petitioner contends that limiting the proviso to searches, seizures of evidence, and arrests would read abuse of process and malicious prosecution out of the statute. Br. 18–23. This fear, however, is based on a misunderstanding of the law. In fact, it is clear that these torts can arise out of improper searches and arrests.

1. Petitioner states that abuse of process "ordinarily cannot be committed until after a prosecution has been commenced." *Id.* at 23. That is incorrect; as numerous courts have recognized, both search warrants and arrest warrants constitute legal process that can be tortiously abused.

For example, the First Circuit has explained that "obtaining search and arrest warrants by means of false testimony" and for "improper collateral objectives," such as retaliation, "is a proper basis for a claim of abuse of process." *Gonzalez Rucci v. U.S. Immigration & Naturalization Serv.*, 405 F.3d 45, 50 (1st Cir. 2005); see also *Lyons v. Midwest Glazing, LLC*, 235 F. Supp. 2d 1030, 1042 (N.D. Iowa 2002) ("[A] search warrant constitutes 'legal process' for the purposes of a claim of abuse of process."); *Hughes v. Lynch*, 338 Mont. 214, 222 (2007) ("In the context of

the abuse of process tort, process may refer to . . . arrest under a warrant . . . .”); W. Page Keeton et al., *Prosser & Keeton on Torts* 899 (5th ed. 1984) (“arrest of the person” is a kind of “judicial process” that may be abused).

Consistent with this understanding of “process,” courts have allowed abuse-of-process claims based on allegations that law-enforcement officers executed searches or made arrests for improper purposes pursuant to warrants. See *Garcia v. City of Merced*, 637 F. Supp. 2d 731, 751 (E.D. Cal. 2008) (allegations that officers obtained and used arrest and search warrants for unlawful retaliation stated abuse-of-process claim); see also, e.g., *Van Zandt v. Fish & Wildlife Serv.*, 524 F. Supp. 2d 239, 246–47 (W.D.N.Y. 2007); *Watson v. City of Kan. City*, 185 F. Supp. 2d 1191, 1208 (D. Kan. 2001); *Kaminske v. Wis. Cent. Ltd.*, 102 F. Supp. 2d 1066, 1077–79 (E.D. Wis. 2000); *Guay v. Burack*, Nos. 1:09-cv-217, -253, 2010 WL 716104, at \*12 (D.N.H. Feb. 23, 2010).

These cases belie petitioner’s assertion that “[i]t is difficult to imagine how a federal officer could commit . . . abuse of process in the course of carrying out an arrest, search, or seizure.” Br. 8. There is accordingly no need to extend the proviso to cover conduct unrelated to arrests, searches, or seizures in order to give effect to the proviso’s waiver of immunity for abuse-of-process claims.

2. Petitioner is similarly mistaken in contending that his interpretation is needed to avoid negating the proviso’s reference to malicious prosecution. Granted, a plaintiff alleging malicious prosecution “ordinarily must point to some act apart from the

arrest, search, or seizure.” *Id.* at 22. But it does not follow, as petitioner contends, that “malicious prosecution claims ordinarily do not arise out of conduct incident to arrests, searches, or seizures.” *Ibid.* Although the shorthand “malicious prosecution” may suggest that a prosecution, in the sense of the pursuit of criminal charges after indictment, is required, that is not so.

To begin with, a malicious-prosecution action has long been recognized as an appropriate remedy for an arrest or search executed pursuant to a warrant that is facially valid but was procured by improper and malicious means (*e.g.*, by providing false evidence). See, *e.g.*, *Burns v. Reed*, 500 U.S. 478, 504 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (“At common law, the tort of maliciously procuring a search warrant was . . . a form of the intentional tort of malicious prosecution.”); *Kalina v. Fletcher*, 522 U.S. 118, 134 (1997) (Scalia, J., concurring) (at common law, “one who procured the issuance of an arrest warrant . . . maliciously and without probable cause” could be sued for malicious prosecution (quoting *Malley v. Briggs*, 475 U.S. 335, 340 (1986))).<sup>12</sup>

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<sup>12</sup> A malicious-prosecution action may be premised on allegations that the defendant falsely and maliciously caused a search warrant to issue, notwithstanding that “[n]o criminal or civil action other than the issuance of the search warrant was instituted.” *Dye v. Columbus Retail Merchs. Delivery, Inc.*, No. 75AP-252, 1975 WL 181891, at \*1 (Ohio Ct. App. Nov. 4, 1975); see, *e.g.*, *Scott v. Citizens’ Hardware & Furniture Co.*, 156 So. 469, 470 (La. 1934); *McMullen v. Daniel*, 155 So. 687, 689 (Ala. 1933); *Rankin v. Wagoner*, 15 S.W.2d 470, 471–72 (Ky. Ct. App.

Accordingly, many malicious-prosecution actions based on the conduct of “investigative or law enforcement officers” arise out of the officers’ procurement of search or arrest warrants on false pretenses and for improper and malicious purposes. See *Kuslick v. Roszczewski*, 419 F. App’x 589, 592 (6th Cir. 2011) (affirming denial of officer’s summary judgment motion in malicious-prosecution action based on allegations that officer “fabricated an allegation . . . when seeking a warrant for [plaintiff’s] arrest”); see also, e.g., *Gatling v. Roland*, No. 5:10-cv-55, 2010 WL 3455283, at \*6 (M.D. Ga. Aug. 26, 2010); *Colon-Andino v. Toledo-Davila*, 634 F. Supp. 2d 220, 235 (D.P.R. 2009); *Lutz v. Watson*, 136 A.D.2d 888, 889 (N.Y. App. Div. 1988); *Bender v. City of Seattle*, 664 P.2d 492, 500–02 (Wash. 1983); *Hollinshed v. Shadrack*, 97 S.E.2d 165 (Ga. Ct. App. 1957); *Reby v. Whalen*, 179 A. 879 (Pa. Super. Ct. 1935); *Ladd v. Miles*, 17 P.2d 875 (Wash. 1932). In such cases, there is a compelling argument that unlawfully obtaining a search or arrest warrant is conduct incident to the resulting search or arrest and thus well within the proviso’s waiver of immunity. Indeed, as noted above, Congress specifically understood that it was creating a remedy for searches conducted “with warrants issued without probable cause.” S. Rep. No. 93-588, reprinted in 1974 U.S.C.C.A.N. at 2791.

In addition to cases involving the fraudulent procurement of a warrant, the proviso may also cover situations where an officer provides a false report of

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1929); *Peterson v. Cleaver*, 265 P. 428, 551–52 (Or. 1928); *Granby v. Friedman*, 186 N.W. 628, 629 (Iowa 1922).

a search, seizure, or arrest, which then leads a prosecutor to commence or continue criminal proceedings against an innocent party. Cf. *Adams v. Metiva*, 31 F.3d 375, 388–89 (6th Cir. 1994) (allegation that police officer “lied in his incident report” concerning circumstances of plaintiff’s arrest stated malicious-prosecution claim); *Rodriguez-Esteras v. Solivan-Diaz*, 266 F. Supp. 2d 270, 278–79 (D.P.R. 2003) (allegation that police officers “lied about the character of the items that they found when they arrested Plaintiff” stated malicious-prosecution claim). In such cases, providing the false report of a search, seizure, or arrest is inextricably intertwined with the search, seizure, or arrest reported on.

Employing similar reasoning, at least one court agreed with the government that the proviso does not apply to “wrongdoing outside the context of . . . investigatory or law enforcement duties” but held that the proviso permits a malicious-prosecution claim alleging “a direct link between the . . . officers’ investigatory duties and their alleged wrongdoing.” *Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 99–100 (D.D.C. 2001), *rev’d in part on other grounds*, 341 F.3d 571 (D.C. Cir. 2003).

For these reasons, it is clear that there are numerous scenarios in which a malicious-prosecution action could be premised on conduct of an “investigative or law enforcement officer” incident to a search, seizure, or arrest, and Congress could certainly have had those scenarios in mind when it enacted the proviso. Reading the proviso as limited to conduct of law-enforcement officers acting as such



thus in no way negates the proviso's reference to malicious prosecution. That reference therefore does not support expanding the proviso to scenarios that Congress plainly did not have in mind where an employee who possesses search, seizure, or arrest authority was not acting in an investigative or law-enforcement capacity at all.

**D. Because The Proviso Waives Sovereign Immunity, The Court Need Only Find This Reading Plausible To Affirm.**

If further reason to reject petitioner's reading of the proviso is needed, it is provided by the well-established principle that a waiver of the United States' sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). As the Court has explained:

Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government.

*FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (citations omitted). Congress's intent to waive sovereign immunity in a specific context must be "unmistakable" before a waiver will be found. *Ibid*.

The Court follows these interpretive principles for good reason. It is "elementary that the United States, as sovereign, is immune from suit save as it



consents to be sued.” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (alteration and internal quotation marks omitted). Because only Congress has the power to grant such consent, see *Soriano v. United States*, 352 U.S. 270, 274 (1957), the Court must take care to ensure that a waiver is not “enlarged beyond what a fair reading of the text requires.” *Cooper*, 132 S. Ct. at 1448.

For the same reasons, respect for the separation of powers precludes deference to the Executive Branch’s assertion that immunity has been waived in a particular context. The power to authorize payment from the federal Treasury belongs to Congress alone; although the Executive Branch represents the United States in court, it has no authority to consent to payments from the Treasury that Congress has not authorized. U.S. Const. art. I, § 9, cl. 7; cf. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990) (“Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.”). To protect its unique prerogative over appropriations, Congress enacted the Antideficiency Act, making it a criminal offense for members of the Executive Branch to make payments from the Treasury in excess of appropriations. 31 U.S.C. § 1341(a)(1). The government’s view is thus entitled to no special weight; this Court’s obligation is to determine what Congress intended. Cf. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (government cannot simply agree to separation-of-powers violations).

Accordingly, the Court must treat the proviso as it would any other waiver of sovereign immunity. That means that to affirm the judgment below, the Court need not conclude that *amicus's* reading is the *best* reading of the proviso. It need only determine that § 2680(h) can *plausibly* be read as limiting the waiver of sovereign immunity to claims that arise out of conduct of investigative or law-enforcement officers acting as such—"that is . . . performing [an investigative or law-enforcement] function . . . when taking the action subject to complaint." *Pegram*, 530 U.S. at 226. If so, the Court must choose that interpretation. *Cooper*, 132 S. Ct. at 1448.

According to petitioner, however, this Court's pronouncements on the interpretation of waivers of sovereign immunity do not apply in the FTCA context. Br. 13–14. Petitioner is incorrect. To be sure, the Court has said that the sovereign-immunity canon is "unhelpful" when construing the *exceptions* to the FTCA's broad, general waiver of immunity. *Dolan*, 546 U.S. at 491–92; *Kosak*, 465 U.S. at 853 n.9. But there is no occasion to construe any FTCA exception in this case. It is undisputed that § 2680(h)'s intentional-tort exception bars petitioner's suit, unless the later-enacted proviso waives immunity for it. As a new, and limited, waiver of immunity, the proviso must be interpreted "on its own terms . . . like any normal waiver." Gov't Br. 18 n.4.

This Court has rejected broad construction of FTCA *exceptions*, but it does not follow that traditional sovereign-immunity principles are irrelevant to interpreting *wavers* simply because the

FTCA is involved. Instead, the applicability of the narrow-construction canon should depend on whether what is at issue is a waiver of immunity or an exception to a waiver. The former must be strictly construed, but the latter need not be broadly construed. Compare *Dolan*, 546 U.S. at 491–92 (declining to broadly construe FTCA exception), with *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (stating that while Court has “on occasion narrowly construed exceptions to waivers of sovereign immunity,” it has not “eradicate[d] the traditional principle that the Government’s consent to be sued must be construed strictly in favor of the sovereign” (internal quotation marks omitted)).

That approach—strictly construe waivers, but do not broadly construe exceptions—makes good sense. The purpose of the narrow-construction canon is not to enforce a substantive preference against waivers of immunity, but rather to protect the separation of powers. Narrow construction of waivers protects against the possibility that the courts might find a waiver that Congress never intended. Where Congress has unmistakably waived immunity, in contrast, overly generous interpretation of statutory exceptions is unnecessary to protect Congress’s prerogatives. Indeed, such an approach might just as easily thwart Congress’s will as effectuate it; as the Court has noted in the FTCA context, “unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute.” *Kosak*, 465 U.S. at 853 n.9.

Because this case calls for interpreting neither the FTCA’s general waiver nor any FTCA exception,

there is no danger of construing an exception so generously that it would defeat the purpose of the FTCA. Instead, the danger here is that construing the law-enforcement proviso too generously would expand "the Government's consent to be sued . . . beyond what a fair reading of the text requires." *Cooper*, 132 S. Ct. at 1448; see also *Dolan*, 546 U.S. at 486 (Court should "avoid the giving of unintended breadth to the Acts of Congress" (internal quotation marks omitted)). For these reasons, the "traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign" applies with full force here. *Nordic Vill.*, 503 U.S. at 34 (internal quotation marks omitted).

Finally, petitioner emphasizes language in *Carlson v. Green*, 446 U.S. 14 (1980), suggesting a broad interpretation of the law-enforcement proviso. Br. 28–30. But the Court there did not closely examine the proviso, let alone construe it in light of the principle that waivers of sovereign immunity must be construed strictly in favor of immunity. That rule should trump any ill-considered dicta in *Carlson*. And dicta the Court's statements about § 2680(h) surely are; *Carlson* recognized a *Bivens* remedy *despite*, not because of, the assumption that an FTCA remedy was also available to the plaintiff. See 446 U.S. at 20–22.

**E. Even If The Proviso Is Not Literally Susceptible To *Amicus's* Reading, The Court Should So Construe It To Avoid Absurd Results.**

Even if the Court were to conclude that *amicus's* interpretation of § 2680(h) is not a plausible reading

of the literal statutory text, the Court would not be compelled to accept petitioner's interpretation. The Court has long recognized that a statute's words "may be interpreted against their literal meaning" where they "could not conceivably have been intended" to bear that meaning. *Logan v. United States*, 552 U.S. 23, 36 (2007) (internal quotation marks omitted).<sup>13</sup>

*Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), shows how the absurdity doctrine works and how it could apply here. In *Bock*, the Court confronted a former version of Federal Rule of Evidence 609 that, read literally, mandated the admission of felony convictions when used to impeach civil plaintiffs but not when used to impeach civil defendants. The Court deemed that result absurd, finding it "unfathomable" that the Rule's drafters intended to "deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant." *Id.* at 510. "No matter how plain the text of the Rule may be," the Court reasoned, Congress simply could not have intended that result and therefore the Rule "can't mean what it says." *Id.* at 510–11.

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<sup>13</sup> The absurdity doctrine is closely related to the doctrine of "scrivener's error," under which the Court will interpret a statute contrary to its literal meaning to correct an apparent drafting mistake. See *Holloway v. United States*, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting) ("I search for a plausible purpose because a text without one may represent a 'scrivener's error' that we may properly correct."); see also *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993).



Instead, the Court adopted an interpretation that it believed best accorded with the intent of Congress as gleaned from the legislative history. *Id.* at 523–24. In concurrence, Justice Scalia agreed that where literal interpretation would produce an “absurd result,” the Court’s task was to select an alternative construction that “does least violence to the text” and is “consistent with the policy of the law in general.” *Id.* at 528–29.<sup>14</sup>

The Court should follow a similar course here. If the Court concludes that the phrase “acts or omissions of investigative or law enforcement officers” in § 2680(h) cannot reasonably be read as “acts or omissions of investigative or law enforcement officers acting as such,” it should nonetheless construe the proviso in that fashion to avoid absurd and irrational consequences. As explained, see *supra* Part I.A.2, petitioner’s interpretation of the proviso would lead to two different sets of results that Congress “could not conceivably have . . . intended,” *Logan*, 552 U.S. at 36. First, the proviso would waive immunity for non-law-enforcement-related workplace torts depending on whether the tortfeasor happened

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<sup>14</sup> Both the majority and the concurrence in *Bock* also raised the possibility that the literal reading of the rule might be not only absurd, but also unconstitutional. See 490 U.S. at 510; *id.* at 528 (Scalia, J., concurring). The decision to depart from the literal meaning, however, rested on the absurdity doctrine, not the canon of constitutional avoidance, given that the text was clear. Cf. *Clark v. Martinez*, 543 U.S. 371, 380–81 & n.5 (2005) (canon of constitutional avoidance is “a tool for choosing between competing *plausible* interpretations of a statutory text” (emphasis added)).



to possess law-enforcement powers irrelevant to the alleged tort. Second, the proviso would make the United States liable for the intentional torts of a large swath of federal employees who possess one of the enumerated law-enforcement authorities, even though those employees' job functions are largely unrelated to law enforcement and miles away from what Congress had in mind in creating a remedy for victims of raids like those in Collinsville.

Petitioner has advanced no plausible reason why Congress would have intended such outcomes, and there is none. As this Court has explained, that Congress truly intended a statute to be "arbitrary" is "not to be presumed lightly." *United States v. Wilson*, 503 U.S. 329, 334 (1992). And indeed, the legislative history described above suggests that Congress did *not* intend those results. See *Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.").

Even if the Court would otherwise be hesitant to apply the absurdity doctrine, it should be more willing to do so here in light of the strong, constitutionally rooted presumption against finding unintended waivers of sovereign immunity. See *supra* Part I.D. The Court has been particularly reluctant to accept absurd results that also run counter to other interpretive canons that serve important constitutional values. Thus, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Court rejected a literal reading of a criminal statute dealing with traffic in child pornography

where that reading would have “swe[pt] within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material,” a result the Court deemed “positively absurd.” *Id.* at 69. The Court further stated that its “reluctance to simply follow the most grammatical reading of the statute” was “heightened” by its prior case law establishing a “presumption in favor of a scienter requirement” to avoid “criminaliz[ing] otherwise innocent conduct.” *Id.* at 70, 72.

As explained, this Court follows an analogous presumption when dealing with waivers of sovereign immunity. This case shows why that presumption is important. To agree with petitioner, this Court would have to conclude that Congress chose to open the purse-strings to the Treasury in an arbitrary fashion and in a way that there is no evidence that anyone in Congress contemplated. Given that finding a waiver that Congress did not actually intend would be no mere error of statutory interpretation but would also have serious separation-of-powers implications, this Court should be especially reluctant to accept petitioner’s interpretation.

## **II. Because The Guards Were Not Acting In An Investigative Or Law-Enforcement Capacity, Petitioner’s Suit Is Barred.**

For the reasons explained in Part I, *supra*, the law-enforcement proviso is best understood to apply only when an employee acts in his capacity as an “investigative or law enforcement officer” at the time of the alleged tort. If someone who happens to possess the authorities that define him as an “investigative or law enforcement officer” is not

acting as such, the proviso does not apply. Cf. *Pegram*, 530 U.S. at 226 (employer is fiduciary under ERISA only where it was “acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint”). So construed, the proviso does not waive the United States’ sovereign immunity with respect to petitioner’s suit.

There is no dispute that petitioner’s guards were not executing a search, seizing evidence, or making an arrest at the time of the alleged torts. Thus, they were not exercising any of the “investigative or law enforcement” powers enumerated by Congress in § 2680(h). Nor were the guards engaged in “investigative or law enforcement” activities incident to the exercise of any of the authorities specified in the statute, so that the guards might still be said to have been acting in an “investigative or law enforcement” capacity at the time of the alleged torts. For example, writing a report of a search could be viewed as so closely related to executing the search itself as to fall within the proviso, and the D.C. Circuit surely was correct that an officer need not personally make an arrest before an FTCA claim can be brought based on the officer’s conduct with respect to (albeit not literally *during*) the arrest. *Sami*, 617 F.2d at 765 n.16 (“Liability for false arrest or false imprisonment has not been excluded merely because the instigator never laid hands on the victim.”). The proviso may even embrace other investigative or law-enforcement activities beyond the three that Congress enumerated, as a number of lower courts have concluded or suggested. See *supra* Part I.B.

The Court need not plot the outer reaches of the proviso with precision to decide this case, however. The conduct alleged here is far beyond those limits, wherever they lie, because the alleged tortfeasors were not engaged in any investigative or law-enforcement activity at all. To the contrary, as prison guards dealing with an already-incarcerated inmate inside a prison, they were performing a security function, not a law-enforcement function. Petitioner's alleged sexual assault at the hands of prison guards bears no relationship, close or distant, to enforcing or investigating a violation of any federal law.

Petitioner argues that "an assault by on-duty prison guards of a prisoner under their charge, occurring on prison grounds and under color of their federal authority" is the type of conduct to which the proviso should apply. Br. 38. But petitioner fails to draw any connection between this alleged conduct and the authorities that mark BOP guards as "investigative or law enforcement officers." To fit prison guards within that category, petitioner and the government rely on 18 U.S.C. § 3050 and 28 C.F.R. § 511.18. Pet. Br. 12 n.4; Gov't Br. 31. But those provisions have nothing to do with the guards' alleged conduct here. They authorize all BOP staff (not just guards) to make warrantless arrests of non-inmates (such as visitors) or escaped inmates. See 18 U.S.C. § 3050 (BOP employees may make warrantless arrests where "there is [a] likelihood of such person's escaping before an arrest warrant can be obtained"); 28 C.F.R. § 511.18 (describing BOP policies for arrest of non-inmates). Those authorities are entirely inapplicable to the daily work of prison

guards like the alleged tortfeasors here, who interact with non-escaped inmates inside the prison.

Prison guards' authority over currently confined inmates like petitioner derives not from their limited and inapplicable arrest authority, but rather from their responsibility for maintaining security and order within the prison. See 18 U.S.C. § 4001 (vesting Attorney General with "control and management of Federal penal and correctional institutions" and "government" of inmates); *id.* § 4042(a) (requiring BOP to perform these functions under Attorney General's direction); 28 C.F.R. § 552.22 (authorizing prison guards to use appropriate force against inmates).

When acting in that security-related role, prison guards are not acting in an "investigative or law enforcement" capacity for purposes of § 2680(h). See *Devillier*, 2010 WL 476722, at \*5 (federal prison guard who shot prisoner while responding to fight among inmates was "simply acting as a prison security officer" and not in an investigative or law-enforcement capacity); cf. *Holian*, 2009 WL 2413979, at \*1-3 (accepting government's distinction between military gate guards' "security function" and their "law enforcement or investigative" function). BOP guards possess "investigative or law enforcement" authority only vis-à-vis non-inmates; when interacting with currently confined inmates, they are



performing a security function that does not trigger § 2680(h)'s sovereign immunity waiver.<sup>15</sup>

If liability were permitted here solely because the U.S. Code gives prison guards a wholly inapposite power to arrest, then the law-enforcement proviso would sweep within its reach the torts of innumerable other federal officers—including OSHA inspectors, federal park employees, and every federal judge—who spend most or all of their working time performing tasks that have nothing to do with law enforcement. See *supra* Part I.A.2. There is no reason to imagine that Congress intended such a result, and the Court should not construe a limited waiver of sovereign immunity to permit claims against the Treasury in a broad swath of circumstances that Congress did not contemplate. BOP guards may qualify as “investigative or law enforcement officers” by virtue of their inapposite arrest and search authority cited by petitioner, but their conduct falls within the proviso only when they act in the capacity of “investigative or law enforcement officers” such as by executing searches, seizing evidence, or making arrests. Because there are no such allegations here,

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<sup>15</sup> Petitioner also contends that this case involves “law enforcement activities” because “[t]he conduct alleged . . . is fundamentally different from the ‘workplace torts’ at issue in cases like *Orsay*.” Br. 38. That proves far too little. That petitioner and the guards were not co-workers does not mean that the guards were acting as law-enforcement officers. The purpose of construing the proviso as limited to “investigative or law enforcement officers” acting as such is not merely to exclude “workplace torts,” but rather to limit the proviso to the activities Congress had in mind in enacting it.



petitioner's allegations are barred by the United States' sovereign immunity.

### **III. The Court Can Also Affirm On The Ground That The Guards Acted Outside The Scope Of Their Employment.**

Even if the Court were to conclude that petitioner's suit need not arise out of a search, seizure of evidence, arrest, or closely related law-enforcement activity, the suit still must be based on conduct within the guards' scope of employment in order to come within the FTCA. 28 U.S.C. § 1346(b)(1). Intentional sexual assault of an inmate, however, is indisputably not conduct within a federal correctional officer's scope of employment under Pennsylvania law. The Court should therefore affirm the judgment below on this alternate ground.

1. In considering whether the United States has waived its immunity with respect to petitioner's suit, the Court "is not limited by the precise terms of the question presented," *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978), but may affirm the Third Circuit's judgment "on any ground supported by the record," *Bennett v. Spear*, 520 U.S. 154, 166–67 (1997). Moreover, because the scope-of-employment requirement is a condition of the FTCA's "jurisdictional grant," *FDIC v. Meyer*, 510 U.S. 471, 477 (1994), the Court has "an independent obligation" to address it, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); see also, *e.g.*, *Ignacio*, 674 F.3d at 255 (proviso "does not relax the FTCA's jurisdictional mandate requiring that torts be committed within the scope of employment"). Finally, the scope-of-employment inquiry is closely

intertwined with the specific question on which the Court granted certiorari, as both concern the type of conduct by federal prison guards that can subject the United States to liability under the FTCA. Understanding how the scope-of-employment requirement applies will inform the Court's understanding of the implications of the various interpretations of § 2680(h) on offer.

The jurisdictional nature of the scope-of-employment requirement also means that the government's attempted concession as to one of the officers, Gov't Br. 30, and petitioner's reliance on that concession, Pet. Br. 12, are unavailing. "[A] party may not create jurisdiction by concession," *Vaden v. Discover Bank*, 556 U.S. 49, 56 (2009) (internal quotation marks omitted), and "executive branch officials cannot waive sovereign immunity," *On-Site Screening, Inc. v. United States*, 687 F.3d 896, 899 (7th Cir. 2012); see *supra* Part I.D. Thus, the scope-of-employment issue remains squarely on the table.

2. The scope-of-employment determination here is governed by Pennsylvania law. 28 U.S.C. § 1346(b)(1); *Williams v. United States*, 350 U.S. 857 (1955) (per curiam). Under Pennsylvania law, it is clear that acts of deliberate sexual abuse like those alleged by petitioner do not fall within a prison guard's scope of employment.

Pennsylvania's scope-of-employment law "is well-established and crystal clear." *R.A. ex rel. N.A. v. First Church of Christ*, 748 A.2d 692, 699 (Pa. Super. Ct. 2000). An employee's conduct is within the scope of employment if

(1) it is of a kind and nature that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer.

*Ibid.* Assaults committed in an "outrageous manner" necessarily fall outside the scope of employment:

Where . . . the employee commits an act encompassing the use of force which is excessive and so dangerous as to be totally without responsibility or reason, the employer is not responsible as a matter of law. If an assault is committed for personal reasons or in an outrageous manner, it is not actuated by an intent of performing the business of the employer and is not done within the scope of employment.

*Fitzgerald v. McCutcheon*, 410 A.2d 1270, 1272 (Pa. Super. Ct. 1979) (citing *Lunn v. Boyd*, 169 A.2d 103, 104-05 (Pa. 1961)).

Here, the alleged assault was plainly outside the scope of the guards' employment. It is impossible to characterize intentional sexual assault of an inmate as conduct of the "kind and nature" that federal correctional officers are "employed to perform," except by defining the relevant conduct at such a high level of generality (e.g., "interacting with inmates") as to render the requirement meaningless.

Indeed, BOP makes clear to its employees that sexual contact with inmates is strictly forbidden. See BOP Conduct Standards, *supra*, at 8 (“An employee may not engage in, or allow another person to engage in, sexual behavior with an inmate. Regardless of whether force is used, or threatened, there is never any such thing as ‘consensual’ sex between staff and inmates.”).

Nor did petitioner allege that the guards’ actions were motivated “by a purpose to serve” BOP. One of petitioner’s *amici* contends that prison guards use sexual abuse to “control inmates.” Lambda Legal Br. 25. But even if petitioner had asserted that the guards’ actions represented a misguided attempt to further BOP goals, that would not matter, for the alleged assault is patently “outrageous” conduct that falls outside the guards’ scope of employment as a matter of law. *Fitzgerald*, 410 A.2d at 1272. For example, in *Howard v. Zaney Bar*, a bartender, who was employed in part to “maintain order in the bar,” shot a patron for making advances on a female customer; his conduct was outside the scope of employment as a matter of law because his “use of violence” was “shocking and a gross abuse of all authority the bartender possessed to maintain order.” 85 A.2d 401, 402 (Pa. 1952).

In numerous other cases, Pennsylvania courts have not hesitated to hold as a matter of law that employees’ sexual and physical assaults do not satisfy scope-of-employment requirements. They have held, for example, that a day care employee who molests a child under his charge does not act within the scope of employment under “deeply entrenched

law” because “[t]here can be no doubt” that such “actions were conducted for personal reasons only and were utterly outrageous in manner.” *Sanchez by Rivera v. Montanez*, 645 A.2d 383, 391 (Pa. Commw. Ct. 1994); see also, e.g., *Matthews v. Roman Catholic Diocese of Pitts.*, 67 Pa. D. & C.4th 393, 395 n.1 (Pa. Ct. Com. Pl. 2004) (“[A] church is not responsible for acts of sexual abuse committed by a minister or priest because such activity is outside the scope of employment.”); *R.A.*, 748 A.2d at 700 (minister’s rape of minor was not “actuated by any purpose of serving the Church” and was “outside the scope and nature of his employment”); *Costa v. Roxborough Mem’l Hosp.*, 708 A.2d 490, 494–95 (Pa. Super. Ct. 1998) (hospital worker’s “intentional assault” on hospital security employee was not “actuated by a purpose to serve his employer” and so was “precisely the type of act which is so willful, excessive, outrageous, and without responsibility, as to exceed his scope of employment . . . as a matter of law”).

What is more, at least one federal court of appeals applying a substantially identical scope-of-employment standard has concluded that a federal prison guard’s sexual assault of an inmate is outside the scope of employment. The Sixth Circuit addressed that question under Kentucky law, which, like Pennsylvania law, provides that an employee’s act is within the scope of employment only if “(1) the act is of the kind the [employee] is employed to perform; (2) it occurs substantially within the authorized time and space limits of the employment; and (3) the [employee] is actuated, at least in part, by a purpose to serve [the employer].” *Flechsig v. United States*, 991 F.2d 300, 303 (6th Cir. 1993) (quoting



*Fournier v. Churchill Downs-Latonia, Inc.*, 166 S.W.2d 38, 40 (Ky. Ct. App. 1942)). The court held that test not satisfied where a corrections officer allegedly sexually assaulted an inmate. The court recognized that such an assault was “far from what [the officer] was employed to do” and that “it would be impossible to assert that he was actuated in any way by the purpose of serving the Bureau of Prisons.” *Ibid.*; see also *Shirley v. United States*, 232 F. App’x 419, 420 (5th Cir. 2007) (holding, under Texas’s similar scope-of-employment test, that federal prison guard’s sexual assault of inmate did not “gr[o]w out of a legitimate employment duty or goal”).

In the face of this overwhelming authority, one *amicus* observes that “[m]any jurisdictions have held that even such egregious abuse as rape can be within the scope of employment.” Lambda Legal Br. 13 n.4. Perhaps some jurisdictions, seeking to allow plaintiffs “a chance to recover from a deep-pocket employer rather than a judgment-proof employee,” have replaced the traditional scope-of-employment test with one that “is akin to asking whether the defendant merely was on duty or on the job when committing the alleged tort.” *Harbury v. Hayden*, 522 F.3d 413, 422 n.4 (D.C. Cir. 2008). But Pennsylvania is not among them. The government did not provide any support or explanation when it told the district court below that Pealer was within the scope of employment, and neither petitioner, nor the government, nor any of petitioner’s *amici* cites any case law suggesting that Pennsylvania courts would consider sexually assaulting inmates the type of work that federal prison guards are employed to perform.



Accordingly, the Court can affirm the judgment below on the alternate ground that because petitioner's allegations do not pertain to conduct within the scope of the guards' employment, the United States' sovereign immunity bars his suit.

### CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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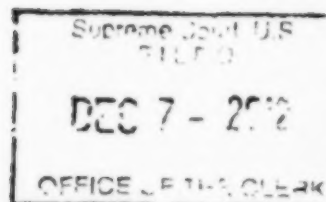
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January 11, 2013

**AMICUS  
CURIAE  
BRIEF**

RECORDED  
AM  
DATE

No. 11-10362



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**In the Supreme Court of the United States**

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KIM MILLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**BRIEF FOR LAMBDA LEGAL DEFENSE AND EDUCATION  
FUND, INC., JUST DETENTION INTERNATIONAL,  
NATIONAL CENTER FOR TRANSGENDER EQUALITY,  
TRANSGENDER LEGAL DEFENSE AND EDUCATION  
FUND, AND WOMEN'S PRISON ASSOCIATION AS  
AMICI CURIAE IN SUPPORT OF PETITIONER**

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## INTEREST OF AMICI<sup>1</sup>

Amici are organizations that seek justice for victims of the epidemic of sexual violence against inmates in detention settings, which especially targets members of particularly vulnerable groups, including women and those who are lesbian, gay, bisexual, or transgender.<sup>2</sup> Amici have engaged in considerable educational, advocacy, and litigation efforts to protect people in prisons from sexual violence and to afford legal remedies to victims of that violence. Amici believe that the context around sexual violence against prisoners, including the violence that petitioner alleges was committed against him, will assist the Court in resolving the question presented.

## STATEMENT

This case arose following an alleged sexual assault at the United States Penitentiary in Lewisburg, Pennsylvania.<sup>3</sup> Petitioner Kim Millbrook was transferred

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<sup>1</sup> Respondent has consented to the filing of this amicus brief, and petitioner has filed a blanket consent to all amicus curiae briefs, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> A description of each of the amici organizations is included in an appendix hereto.

<sup>3</sup> The record should be viewed in the light most favorable to petitioner for purposes of this appeal from the grant of a motion for summary judgment. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982).



from the United States Penitentiary in Terre Haute, Indiana, to Lewisburg on March 1, 2010. J.A. 69. Petitioner had a reputation for being "disruptive" because, among other things, he had filed complaints alleging misconduct by Terre Haute prison officers. J.A. 19; U.S. Br. 2-3. Upon his arrival at Lewisburg, petitioner told prison authorities that he had been sexually assaulted by staff at Terre Haute, and that he had been threatened and attacked by inmates there. He requested measures to protect him from similar attacks in Lewisburg. J.A. 69-70. He was nonetheless placed with violent cellmates who, in petitioner's first days at Lewisburg, attacked him. J.A. 69-70.

On March 4, 2010, following a pre-dawn attack by a cellmate, petitioner was taken by prison staff to the facility's first floor shower area. J.A. 35, 70. Officer Pealer came to petitioner in the shower area and said "he was tired of" petitioner's "crying" to staff that petitioner's "life and safety were in danger." J.A. 71. Officer Pealer told petitioner that petitioner "was mouthing off to staff" and that "[w]e are going to show you what Lewisburg is all about." J.A. 35.

Officer Pealer then secreted petitioner from the shower area to a camera-less area in the basement. J.A. 12, 32, 35. There, Officer Pealer and two of his colleagues assaulted, battered, and raped petitioner. J.A. 71-72. While one officer restrained petitioner in a chokehold, a second stood watch. Officer Pealer stood in front of petitioner, unzipped his pants, and forced petitioner to perform oral sex on him. J.A. 11, 36, 71-72. Then one of the officers called petitioner "a little snitch bitch." J.A. 72. The officers told petitioner that if he were to relate what had happened that morning to anyone else, the officers would kill him. J.A. 36, 72. Peti-

tioner reported the sexual assault the next day. J.A. 73. An internal administrative review found that petitioner had failed to substantiate his claim of rape. J.A. 73.

After the administrative process concluded, petitioner sued the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671-2680. J.A. 9. The district court granted summary judgment in favor of the government on the ground that the suit was barred by the FTCA's intentional tort exception as construed by the Third Circuit in *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir.), cert. denied, 479 U.S. 849 (1986). J.A. 89, 95. *Pooler* held that only claims arising out of an intentional tort committed by an investigative or law enforcement officer while that officer is executing a search, seizing evidence, or making arrests for violations of federal law are within the law enforcement proviso's waiver of sovereign immunity. In an unpublished per curiam opinion, the Court of Appeals for the Third Circuit affirmed. J.A. 101-102.

The United States has conceded that petitioner's intentional tort claim falls within Section 2680(h)'s law enforcement proviso and the FTCA's waiver of sovereign immunity, and that *Pooler* was incorrectly decided. See U.S. Br. 14-15.

## SUMMARY OF ARGUMENT

A. Under the FTCA, Congress established a "broad waiver of sovereign immunity." *Kosak v. United States*, 465 U.S. 848, 852 (1984). Subject to a list of enumerated exceptions, the FTCA allows persons injured by the tortious acts of federal employees within the scope of their employment to pursue a claim for

money damages against the United States in federal district court. 28 U.S.C. 1346(b), 2671-2680. One such exception, known as the "intentional torts exception," provides that the United States retains immunity for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). The exception is limited, in turn, by the so-called "law enforcement proviso," which states that the FTCA "shall apply to any claim arising" from "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" that is "with regard to acts or omissions of investigative or law enforcement officers of the United States Government." *Ibid.* The subsection defines "investigative or law enforcement officer" to mean "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

By the plain text of the statute, an aggrieved person's ability to sue the federal government under the law enforcement proviso depends on only two requirements: that (1) the claim arises out of one of the enumerated categories of tortious conduct; and (2) the employee who committed the act or omission at issue was a "law enforcement officer." The statute imposes no further limitation based on the particular activity in which the officer was engaged at the time of the tortious act.

Construing the statute according to its plain terms advances Congress's purpose in adopting the law enforcement proviso. Congress intended to provide a remedy for victims of torts committed by a class of employees whose job responsibilities, and the authority

and weapons with which they are armed, create a particularly acute risk that they will commit intentional torts within the scope of their employment.

The court of appeals' unjustifiably narrow construction of the proviso would not only eliminate the effective remedy that Congress intended persons who are intentionally injured by government actors to have against the United States, it would also, in many cases, eliminate *any* tort remedy whatsoever for injured persons. The Federal Employees Liability Reform and Tort Compensation Act (the "Westfall Act"), 28 U.S.C. 2679, immunizes federal employees from common law tort claims for most torts committed within the scope of their employment. That Act provides for substitution of the United States as defendant. If the United States also enjoys immunity under 28 U.S.C. 2680(h), prisoners who are battered or assaulted by prison officers may be precluded from seeking any relief, against the officer individually or the United States. The court of appeals' interpretation thus would frustrate the purposes of the FTCA.

B. It is especially critical that a claim be available under the FTCA for prison officers' assaults on prisoners. Due to the inherent nature of incarceration, prisoners are even more vulnerable to assault and battery by law enforcement officers abusing their state-sanctioned power than are other members of the public. In particular, sexual assaults on prisoners by prison officers are an all too common occurrence. In 2003, Congress found that at least 13% of prison inmates had been sexually assaulted while in prison. Frequently, this sexual abuse is carried out by the prison's own staff. The federal Bureau of Prisons has recognized sexual abuse by staff as a "significant problem," and the



federal Bureau of Justice Statistics estimates that one out of every hundred inmates has been compelled by physical force or threats of force to engage in sexual activity with prison staff. Such abuse is particularly high in certain facilities, suggesting that in those institutions' old attitudes that rape is part of an inmate's punishment have yet to be eradicated.

Although Congress has begun an effort to combat this terrible scourge by enacting the Prison Rape Elimination Act ("PREA"), 42 U.S.C. 15601 *et seq.*, certain inmate populations remain especially vulnerable to sexual abuse at the hands of those who are meant to guard them. In particular, men and women with non-heterosexual orientations, those who have been victimized previously (who are disproportionately women), and most of all transgender inmates, are especially vulnerable and likely to be subjected to sexual abuse by prison staff.

In some instances, prison officers use sexual assault as an illegitimate means to establish control over inmates. Petitioner's allegations are fully consistent with this sad reality. Petitioner alleges that during the course of the assault the perpetrators accused petitioner of being a "snitch" and "mouthing off to staff" and warned "we are going to show [petitioner] what Lewisburg is about." J.A. 32, 35, 72.

Where, as is often the case, a prison's administration has failed to implement a zero-tolerance policy for sexual abuse, and prisoners' administrative complaints are given little credence, a judicial action under the FTCA may be the prisoner's only means to hold the government accountable. Access to the courts is therefore critical to stemming the epidemic of prison sexual

abuse. Here, petitioner does not ask the Court to create a cause of action to remedy the wrong done to him. Rather, petitioner asks only that the FTCA be applied according to its terms and consistent with Congress's intent to provide a remedy for those who are victimized when law enforcement officers abuse their state-sanctioned authority to commit egregious assault or battery.

## ARGUMENT

### **I. THE FTCA EXPRESSLY WAIVES IMMUNITY FOR SPECIFIED INTENTIONAL TORTS BY "LAW ENFORCEMENT OFFICERS," WITHOUT LIMITATION BASED ON THE CONTEXT OF THE TORTIOUS ACT**

#### **A. The Court Of Appeals Erred By Importing A Limit Into The Law Enforcement Proviso That The Text Does Not Support**

Statutory analysis of course "begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). The Court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); see also *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010) ("It is not for us to rewrite [a] statute so that it covers only what we think is necessary to achieve what we think Congress really intended."). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank*, 503 U.S. at 254 (internal quotation marks and citation omitted).

The language of the law enforcement proviso is clear: with regard to "acts or omissions" of "investigative or law enforcement officers," the FTCA "shall ap-



ply” to “any claim” arising out of specified intentional torts, including assault and battery. The text of the proviso thus identifies a *category* of federal officials whose conduct might subject the United States to suit. The subsection defines that category of officers according to the *legal authority* they wield. That is, the subsection applies to federal officials who are “*empowered by law* to execute searches, to seize evidence, or to make arrests.” 28 U.S.C. 2680(h) (emphasis added). If the subsection had been intended to apply only to those officials based on the particular function they were fulfilling at the time of the tortious conduct, it instead would have been written to apply to federal officers’ conduct “*in the execution* of searches, seizure of evidence, or making of arrests,” which it does not. To the contrary, nothing in the text limits the “acts or omissions” of officers for which the United States may be sued to those made during a search, seizure, or arrest.

The court of appeals’ attempt to read an activity-based limitation into the statutory phrase “law enforcement officer” is similar to the argument this Court considered and rejected in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008). There, the Court construed Section 2680(c), which preserves immunity for certain claims arising out of the detention of goods by “any officer of customs or excise or any other law enforcement officer.” 28 U.S.C. 2680(c). The Court held that the phrase “any other law enforcement officer” was unambiguous and included *all* law enforcement officers, not merely those acting in a customs or excise capacity. *Ali*, 552 U.S. at 218-219.

The text of Section 2680(h) affords no basis to limit the scope of the waiver of immunity to officers acting in

the course of executing a search warrant, seizing evidence, or making an arrest.

**B. Congress Intended The Law Enforcement Proviso To Allow A Remedy Against The United States For Injuries Caused By Law Enforcement Officers' Abuse Of Their Unique Power**

The impetus for the law enforcement proviso's passage was several highly publicized and widely criticized raids by federal narcotics officers in Collinsville, Illinois in 1973. See generally Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. Rev. 497 (1976) (describing raids, congressional reaction, and amendatory process). Twice in one evening, federal agents burst into residential homes unannounced, flashed their badges, brandished pistols, and held the unsuspecting homeowners at gunpoint while fellow agents ransacked the homes. The agents, it turned out, had the wrong addresses. See *id.* at 500-501. Neither family could pursue a remedy under the FTCA at the time because of the intentional tort exception. By enacting the law enforcement proviso, Congress sought to provide a judicial mechanism to compensate victims of abuses committed by powerful law enforcement officials. See *Daniels v. United States*, 470 F. Supp. 64, 67-68 (E.D.N.C. 1979) ("[T]he legislative background shows Congress intended to provide an effective remedy for innocent victims of federal law enforcement abuses through established FTCA procedures and analogous case law.").

Although the Collinsville raids may have been the immediate cause of Congress's decision to enact the law

enforcement proviso, the amendment was, more broadly, a response to a growing national consensus demanding more direct accountability for the abuses of government power. See Boger et al., *supra*, 498-499 (noting confluence in early 1970s of Kent State tragedy, May Day mass arrests in Washington, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and Attica prison debacle). Congress therefore did not limit the scope of the proviso to egregious no-knock searches or other specified activities, but rather lifted the government's immunity in "any case" involving the enumerated torts committed by law enforcement officers. A Senate committee report reflected this choice, noting that the amendment was not "limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of federal law." S. Rep. No. 93-588, 93d Cong., 2d Sess. (1974).

**C. The Court Of Appeals' Narrow Reading Of The Proviso Would, In Many Cases, Deprive Aggrieved Persons Of Any Remedy, Thereby Frustrating The FTCA's Remedial Purpose**

1. **Congress intended the FTCA to provide a remedy to those injured by law enforcement officers' abuse of power**

As a general matter, the Court strictly construes waivers of sovereign immunity in favor of the sovereign. See *McMahon v. United States*, 342 U.S. 25, 27 (1951). The Court has recognized, however, that an unduly narrow construction of the FTCA, or an unduly broad reading of its exceptions, would defeat the very

purpose of the statute, which was to provide plaintiffs injured by federal employees an opportunity to recover directly against the government. See *Kosak*, 465 U.S. at 853 n.9 (noting that “unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute”); *Feres v. United States*, 340 U.S. 135, 140 (1950) (“The primary purpose of the [FTCA] was to extend a remedy to those who had been without \* \* \*.”). As the Court has cautioned, when interpreting the FTCA, a judge should not, “as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.” *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

The court of appeals’ holding limiting the law enforcement proviso to tortious conduct committed during the course of a search, seizure, or arrest would frustrate the FTCA’s purpose of providing a viable damages remedy to those injured at the hands of overzealous or irresponsible federal law enforcement officers. The federal government confers immense power on law enforcement officers: it arms them with weapons, authorizes them to use force that would be unlawful in other contexts, and places them in positions of authority where conflict is rife and members of the public or those who are detained are highly vulnerable to abuse. Congress therefore provided that the United States should be liable for claims arising out of specified tortious conduct by those officers. The court of appeals’ cramped reading of the law enforcement proviso would, by contrast, leave many victims without any remedy at all, where Congress specified that the United States should be liable.

2. **Because the Westfall Act will often bar suit against the individual officer, the FTCA may be the only remedy for a law enforcement officer's tort**

Congress has, by statute, made the remedy against the United States under the FTCA the exclusive remedy in most cases for persons injured by a federal employee, and barred claims against the employees individually. Passed in 1988, the Westfall Act immunizes federal employees against personal liability for common law torts committed within the scope of their employment. The Westfall Act specifies that the remedy against the United States under the FTCA is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1).

In passing the Westfall Act, Congress reasoned that if there were no immunity from personal tort liability, the morale of the federal workforce would suffer, and federal agencies would be impeded in carrying out their missions. See 28 U.S.C. 2671 note. Thus, with the notable exception of claims for violation of the Constitution or of statutes that allow suits against individual employees, the Westfall Act provides that the United States shall be substituted as the defendant whenever the Attorney General certifies that the "employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1). If, however, "an exception to the FTCA shields the United States from suit, the plaintiff may be left without a tort action against any party." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). See *United States v. Smith*, 499 U.S. 160, 166



(1991) (The Westfall Act “makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability.”).

As the law enforcement proviso recognizes, an officer’s conduct in the course of his employment can give rise to claims of intentional tort. The situations in which claims for battery or assault might arise are not limited to the officer’s execution of a search warrant, seizure of property, or making of an arrest. Indeed, prison officers provide a case in point. Their responsibilities place them in frequent physical contact with prisoners in situations in which the prisoner is particularly vulnerable and the officer’s perception of the need for discipline and subservience may cause the officer to use excessive force. Under those circumstances, batteries would frequently satisfy the FTCA and Westfall Act’s “scope of employment” requirement. Indeed, in this case, the government has conceded that the officers were acting within the scope of their employment at the time they allegedly raped petitioner, see U.S. Br. 10, 30, for purposes of “showing” him “what Lewisburg is about,” J.A. 36.<sup>4</sup> Under the court of appeals’ theory,

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<sup>4</sup> For purposes of the FTCA, scope of employment is determined based on the law of the state where the conduct occurred. *Williams v. United States*, 350 U.S. 857 (1955) (per curiam). Many jurisdictions have held that even such egregious abuse as rape can be within the scope of employment, especially when the rape is carried out with the benefit of the “considerable power and authority that police officers possess.” *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1350 (Cal. 1991). See, e.g., *Red Elk v. United States*, 62 F.3d 1102, 1107-1108 (8th Cir. 1995) (holding tribal police officer’s rape of thirteen-year old girl reasonably foreseeable “blatant violation of trust”); *Applewhite v. City of Baton Rouge*, 380



therefore, short of bringing a constitutional claim, the victim of a law enforcement officer's intentional tort would frequently be deprived of *any* remedy, either against the officer (by the Westfall Act) or against the United States (by Section 2680(h)).<sup>5</sup> That result is contrary to Congress's specific purpose to provide a remedy to such victims.

The opportunity for a prison officer, using the power and authority of the officer's position, to commit an assault or battery upon a prisoner is no less when that prisoner has been confined, as was the case here, than when the individual is first being taken into custody during an arrest. Indeed, the absolute control prison officers have over prisoners in locked prison facilities makes the opportunity for abuse even greater than when a law enforcement officer makes an arrest in public. The court of appeals' distinction thus lacks not only a textual basis, but also any policy justification.

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So. 2d 119, 121 (La. Ct. App. 1979) (holding police officer was acting within scope of his authority when he was able to rape his victim "because of the force and authority of the position which he held"). As detailed below, see Part II, *infra*, rape of prisoners by prison staff is an all too common occurrence.

<sup>5</sup> Whereas a rape victim would presumably be able to bring a constitutional claim against the individual officer, which would not be barred by the Westfall Act, see 28 U.S.C. 2679(b)(2), lesser acts of battery might not reach the level of a constitutional violation or, if they did, might be subject to qualified immunity defenses.

## II. ACCESS TO THE COURTS IS CRITICAL TO DETER SEXUAL ASSAULT OF INMATES BY PRISON OFFICERS, AN ACKNOWLEDGED NATIONAL PROBLEM ARISING FROM THE NEARLY ABSOLUTE POWER THAT PRISON OFFICERS WIELD

Nearly two decades ago this Court established in *Farmer v. Brennan*, 511 U.S. 825 (1994), a case involving a transgender individual, that federal prison officials' deliberate indifference to the risk that an inmate will be raped violates the Eighth Amendment. The Court emphasized that, "[h]aving incarcerated" persons, "having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Id.* at 825. "Being violently assaulted in prison is simply 'not part of the penalty that criminal offenders pay for their offenses against society.'" *Ibid.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).<sup>6</sup>

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<sup>6</sup> This case shares several links with *Farmer* that underscore the importance of affording petitioner his congressionally intended remedy under the FTCA to address the kind of brutal assault that continues to plague prisoners in federal custody. The prisoner in *Farmer* had been raped by another inmate at the U.S. Penitentiary in Terre Haute, Indiana, *Farmer*, 511 U.S. at 830, where petitioner alleges he too was sexually assaulted by a prison officer. J.A. 69-70. Notably, in *Farmer*, the then-warden of Lewisburg admitted that the transgender prisoner in *Farmer* would also be "unsafe" at his facility. *Farmer*, 511 U.S. at 848-849. Here, after being transferred to Lewisburg, petitioner requested protection from further assaults in light of his history and heightened risk of victimization, but was instead brutally raped by Lewisburg prison officers. Petitioner's experience suggests that deterring and responding to prison rape, including at these two penitentiaries, has remained an urgent government problem in the years since *Farmer*.

Despite *Farmer's* spotlight on the government's tolerance of prison rape and ongoing violation of constitutional norms, sexual assaults of prisoners have continued at alarming rates. In 2009, the federally appointed National Prison Rape Elimination Commission reported that "[u]ntil recently, \* \* \* the public viewed sexual abuse as an inevitable feature of confinement. Even as courts and human rights standards increasingly confirmed that prisoners have the same fundamental rights to safety, dignity, and justice as individuals living at liberty in the community, vulnerable men, women, and children continued to be sexually victimized by other prisoners and corrections staff." Nat'l Prison Rape Elimination Comm'n, 108th Cong., *Report 1* (2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf> ("*Comm'n Report*").

The court of appeals' position, that Section 2680(h) of the FTCA preserves the government's immunity from tort liability when prison officers sexually assault inmates, strips vulnerable prisoners of a critical means to ensure that the government "is not free to let the state of nature take its course." The court of appeals' ruling frustrates the underlying purpose of the FTCA and should be rejected.

**A. In The Prison Rape Elimination Act, Congress Acknowledged The Problem Of Prison Rape And The Government's Responsibility To Stop It**

In 2003, Congress affirmed the government's responsibility to protect incarcerated persons from sexual assault, unanimously passing the Prison Rape Elimination Act, signed into law by President George W. Bush. PREA addressed entrenched institutional failures by

federal and state prison systems to prevent and respond to endemic sexual assaults against prisoners. According to Congress's findings in enacting PREA, "[m]embers of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates." 42 U.S.C. 15601(12).

Congress found that, by conservative estimates, at least 13% of inmates had been sexually assaulted in prison, and nearly 200,000 inmates incarcerated at that point "have been or will be the victims of prison rape." 42 U.S.C. 15601(2). Congress also found that "[m]ost prison staff are not adequately trained or prepared to prevent, report, or treat inmate sexual assaults." 42 U.S.C. 15601(5). Moreover, victims "often receive inadequate treatment for the severe physical and psychological effects of sexual assault—if they receive treatment at all." 42 U.S.C. 15601(6).

PREA mandated a "zero-tolerance standard for the incidence of prison rape" in the United States. 42 U.S.C. 15602(1). It established the National Prison Rape Elimination Commission and a Review Panel on Prison Rape to investigate this national problem and recommend remedial standards, 42 U.S.C. 15603(b)(1), 15606(a); called for federal data collection, study, and reports on the epidemic of sexual assaults by both inmate and staff perpetrators in federal and state systems of confinement, 42 U.S.C. 15603-15604, 15606; and directed adoption of national standards, based on the PREA-mandated studies and findings, for the detection, prevention, reduction, and punishment of prison rape. 42 U.S.C. 15607. Congress further directed that, when issued, those standards would be immediately

binding on the federal Bureau of Prisons ("BOP"). 42 U.S.C. 15607(b).

The final PREA standards, issued by the Department of Justice ("DOJ") on May 12, 2012, include numerous provisions acknowledging and responding to the ongoing sexual victimization of inmates not only by other inmates but also by the very prison officers responsible for the inmates' safety. See, *e.g.*, 28 C.F.R. 115.6(2) (defining as "sexual abuse" a range of sexual acts committed by prison staff against inmates); 28 C.F.R. 115.15 (limiting cross-gender viewing and searches by prison staff); 28 C.F.R. 115.17 (prohibiting hiring prison staff with history of sexual abuse); 28 C.F.R. 115.51(a), 115.52(c), 115.67 (mandating mechanisms to report sexual abuse by staff and protect against retaliation); 28 C.F.R. 115.66 (prohibiting collective bargaining agreement restraints on ability of prisons, pending investigation, to remove staff alleged to have committed sexual abuse); 28 C.F.R. 115.76 (establishing disciplinary sanctions for staff committing sexual abuse).

#### **B. Recent Studies Highlight The Enormity Of The Problem Of Sexual Abuse In Our Prisons**

Government studies generated pursuant to PREA, as well as from other expert sources, demonstrate that the facts alleged in this case are far from unique to this petitioner. In fact, federal prisoners are sexually assaulted by prison staff in alarming numbers, with particularly vulnerable categories of prisoners especially targeted for sexual abuse. In prison environments, where the government exercises power over every aspect of inmates' lives, prison officers use sexual assault



and the threat of assault to control prisoners in their custody. Not surprisingly, prisoners face tremendous challenges in having their administrative reports of staff sexual assaults lead to conclusive findings and government sanctions against staff perpetrators. Access to the courts to bring civil tort suits against the government thus is critical to hold the government accountable for and deter endemic sexual victimization of prison inmates by correctional staff.

According to the DOJ Office of Inspector General ("OIG"), the BOP itself "has recognized that staff sexual abuse is a significant problem within its institutions," with a former BOP Director acknowledging that "sexual abuse of inmates was one of the most serious forms of misconduct by staff of BOP." Office of the Inspector Gen., U.S. Dep't of Justice, *Detering Staff Sexual Abuse of Federal Inmates* 3 (2005), available at <http://www.justice.gov/oig/special/0504/final.pdf> ("*Detering Staff Sexual Abuse*"). A 2009 OIG report found that from 2001 through 2008, allegations of staff sexual abuse were reported at 92 of the BOP's 93 prison sites. Evaluation and Inspections Div., U.S. Dep't of Justice, Office of the Inspector Gen., *The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates* 19 (2009), available at <http://www.justice.gov/oig/reports/plus/e0904.pdf> ("*DOJ's Efforts*"). Allegations of criminal sexual abuse by prison staff more than doubled during this period, increasing "at a faster rate than either the growth in the prisoner population or the number of [BOP] staff." *Id.* at iv.

The Bureau of Justice Statistics ("BJS"), a division of DOJ, found that an estimated 1% of all inmates reported having been compelled by physical force or threats of force to engage in sexual activity with prison



staff. Bureau of Justice Statistics, U.S. Dep't of Justice, Office of Justice Programs, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09*, at 9 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf> ("*BJS 2010*"). This rate of abuse translates into the horrific rape and assault of thousands of federal inmates by the officers who guard them. As of 2009, the BOP confined approximately 207,000 inmates, *DOJ's Efforts*, *supra*, at 5; thus, more than 2,000 federal prisoners in confinement at that point alone were sexually assaulted by prison staff using physical force or threats. Moreover, rates of sexual assault of prisoners by staff were as high as 10% at some facilities studied by the BJS, see *BJS 2010*, *supra*, at 9-10, suggesting that certain prison environments breed especially rampant staff sexual abuse of prisoners.

**C. Certain Groups Of Inmates Are Particularly Vulnerable To Sexual Abuse, A Situation That Would Worsen If Court Access Were Curtailed**

Federal studies confirm not only that staff sexual abuse of federal prisoners is a serious, widespread problem, but also that certain particularly vulnerable groups are at especially high risk of sexual victimization in prison. Limiting these victims' recourse to the courts for abuses by correctional staff leaves these inmate groups even more vulnerable to sexual assault within the prison system.

1. According to the National Prison Rape Elimination Commission, "[r]esearch on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations

(gay, lesbian, or bisexual) as well as individuals whose sex at birth and current gender identity do not correspond (transgender or intersex)." *Comm'n Report, supra*, at 73. Thus, for example, a BJS study found that "[i]nmates with a sexual orientation other than heterosexual reported significantly higher rates of \* \* \* staff sexual misconduct," with 6.6% of lesbian, gay, and bisexual prison inmates but only 2.5% of heterosexual inmates reporting misconduct (including physically coerced and other forms of sexual misconduct). *BJS 2010, supra*, at 14. A recent BJS study of sexual victimization reported by state prisoners found that 8% of lesbian and bisexual female former inmates were sexually victimized by staff, more than double the rate for heterosexual females. Bureau of Justice Statistics, U.S. Dep't of Justice, Office of Justice Programs, *Sexual Victimization Reported by Former State Prisoners, 2008*, at 16 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf> ("BJS 2012").

Negative attitudes held towards non-heterosexuals by prison officers no doubt fuel the special vulnerability of gay, lesbian, and bisexual prisoners to sexual abuse. As recently noted by the Review Panel on Prison Rape appointed under PREA, "[n]ational studies have found that a significant number of correctional officers believe that homosexual inmates should not be protected from rape or that if homosexual inmates are raped, they got what they deserved." Review Panel on Prison Rape, U.S. Dep't of Justice, *Report on Sexual Victimization in Prisons and Jails* 48 n.494 (G. J. Mazza ed., 2012), available at [http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea\\_finalreport\\_2012.pdf](http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_2012.pdf) ("Review Panel") (citing studies).

2. Transgender inmates are at particularly significant risk of sexual assault from other inmates or staff, as *Farmer* disturbingly illustrated. “Even when compared to other relatively vulnerable populations, transgender people are perilously situated.” Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men’s Prisons*, 27 Just. Q. 835, 858 (2010). For example, a 2007 study of California prisons found that transgender inmates were 13 times more likely to be sexually assaulted than non-transgender inmates, with a staggering 59% reporting sexual assaults. Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* 3 (2007), available at [http://ucicorrections.seweb.uci.edu/pdf/FINAL\\_PREA\\_REPORT.pdf](http://ucicorrections.seweb.uci.edu/pdf/FINAL_PREA_REPORT.pdf).

3. Inmates who had already experienced sexual victimization before coming to the facility (as petitioner experienced at the Terre Haute facility prior to his arrival and rape at Lewisburg) are also far more likely than inmates without such a history to suffer sexual abuse. “A history of sexual victimization, either in the community or in the facility in which the person is incarcerated, tends to make people more vulnerable to subsequent sexual abuse.” *Comm’n Report, supra*, at 8. Female inmates, in turn, are more likely than male inmates to have such histories of sexual abuse, with a 1999 BJS study finding that 23% of female inmates and 2% of male inmates in federal prisons reported having been sexually abused in the past. Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep’t of Justice, Office of Justice Programs, *Prior Abuse Reported by Inmates and Probationers* 1 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/parip.pdf>.

These high rates of past sexual victimization in turn correlate with “increased risk of further exploitation” within prison. *Comm’n Report, supra*, at 71; see also, e.g., *Peddle v. Sawyer*, 64 F. Supp. 2d 12 (D. Conn. 1999) (describing federal prison officer’s repeated sexual abuse, abetted by other officers, of female prisoner with history of past abuse and ongoing vulnerability). “[I]t has become increasingly apparent that women in confinement face a substantial risk of sexual assault, most often by a small number of ruthless correctional staff who use terror, retaliation, and repeated victimization to coerce and intimidate confined women.” Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 The Prison Rape Elimination Act of 2003*, 32 J. Legis. 142, 158 (2006).

4. According to BJS studies, an inmate’s race also correlates with heightened risk of sexual abuse by prison staff. A BJS study found that prisoners identifying as two or more races (2.3%) or African-American (2.2%) are more likely than white prisoners (1.4%) to suffer sexual abuse by staff. *BJS 2010, supra*, at 18. A recent BJS study of former state inmates found an even greater correlation between prisoner race and staff sexual misconduct, with 11.3% of multi-racial and 6.5% of African-American inmates suffering staff sexual misconduct, compared to 4.5% of white inmates. *BJS 2012, supra*, at 16.

5. Younger prisoners are likewise at higher risk of sexual victimization by prison staff, with an estimated 4.7% of 18 and 19 year olds and 3.4% of 20 to 24 year olds targeted for abuse, as compared to 0.4% of inmates 55 or older. *BJS 2010, supra*, at 18.

#### **D. Sexual Assault And The Threat Of Sexual Assault Are Improperly Used As Tools Of Control Over Inmates**

Although staff sexual assault against a federal inmate constitutes a federal crime, 18 U.S.C. 2241-2244, and is not condoned under official prison policy, it is nonetheless commonly employed to exert dominance and abusive control over inmates. As the National Institute of Corrections has noted, "sexual assault is more of a power issue than a sexual issue." Nat'l Inst. of Corrs., U.S. Dep't of Justice, *Investigating Sexual Assaults in Correctional Facilities* 3 (2007), available at <http://static.nicic.gov/Library/022444.pdf> ("*Investigating Sexual Assaults*").

Indeed, the facts alleged in this case dramatically demonstrate that "rape in detention \* \* \* perpetrated by staff \* \* \* is a means to achieve power and control." Linda McFarlane & Melissa Rothstein, Cal. Coalition Against Sexual Assault, *Survivors Behind Bars: Supporting Survivors of Prison Rape and Sexual Assault* 5 (2010), available at <http://calcasa.org/wp-content/uploads/2010/12/Survivors-Behind-Bars.pdf> ("*Survivors Behind Bars*"). Petitioner alleges that his attackers accused him of being a "snitch" and "mouthing off to staff" and told him "[w]e are going to show you what Lewisburg is about." J.A. 32, 35, 72. "Showing" petitioner "what Lewisburg is about" entailed taking him to an area of the prison beyond range of video surveillance, placing him in a chokehold, raping him, and threatening to kill him if he reported the assault. J.A. 36.

As these allegations illustrate, correctional officers, like the perpetrators in this case, "use rape or the



threat of sexual violence to control inmates.” Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 Prison J. 415, 416 (2000), available at <http://www.wcl.american.edu/endsilence/documents/correctionalofficersperceptionshomosexuality.pdf> (“*Correctional Officers and Their Perceptions*”). The “imbalance of power” between prison guards and inmates is “pivotal” in “enabling sexual misconduct” by staff. Brenda V. Smith & Jaime M. Yarussi, Nat’l Inst. of Corrs./Wash. Coll. of Law Project on Addressing Prison Rape, *Breaking the Code of Silence: Correctional Officers’ Handbook on Identifying and Addressing Sexual Misconduct* 3 (2007), available at <http://static.nicic.gov/Library/022473.pdf> (“*Code of Silence*”); see also *Survivors Behind Bars*, *supra*, at 6 (“In women’s prisons, a significant danger stems from the unchecked power of corrections staff.”).

Staff sexual abuse of prisoners reflects a government-abetted prison culture that accepts sexual victimization of inmates. According to the National Prison Rape Elimination Commission, “[f]acilities in which administrators and management do not emphasize a zero-tolerance culture intrinsically tolerate some level of sexual abuse. An unclear or inconsistent policy sends mixed messages to staff \* \* \* about the acceptability of sexual abuse in that setting.” *Comm’n Report*, *supra*, at 54. Thus, for example, the federal Review Panel on Prison Rape has noted a correlation between a prison culture’s tolerance of the use by correctional officers of verbal means to demean and harass inmates and a high incidence of staff-on-inmate sexual victimization. Review Panel, *supra*, at 24, 48. Prison officers’ attitudes condoning the use of rape against troublesome or vul-



nerable prisoners further “contribute to a rape-prone culture.” *Correctional Officers and Their Perceptions*, *supra*, at 416. Shockingly, almost half of surveyed Texas correctional officers “indicated that some inmates ‘deserved’ to be raped.” *Id.* at 422.

#### **E. The Government Has Inadequately Responded To Prisoners’ Complaints Of Sexual Assault**

The BOP has proven inadequate not only at eliminating conditions that foster staff sexual misconduct but also at investigating and redressing assaults once they have occurred. According to the OIG, “prison staff who sexually abuse inmates often do not believe they will be caught, and if they are caught do not believe they will be punished.” *Deterring Staff Sexual Abuse*, *supra*, at 11-12. Many victims of staff sexual abuse do not report the crime out of fear that their attackers will retaliate with further violence and punitive measures, and that the prison system will leave them unprotected. See *Comm’n Report*, *supra*, at 11, 93-94, 101-106.

Inmates also fear that if they do report an assault, they will not be believed by prison officials, who will accept the account of a correctional officer over that of an inmate. See *Comm’n Report*, *supra*, at 102. As the National Prison Rape Elimination Commission found, “[e]ven when prisoners are willing to report abuse, their accounts are not necessarily taken seriously.” *Ibid.*

Inmate and staff witnesses to staff sexual abuse are particularly reluctant to report the misconduct and cooperate in investigations. The “code of silence” prevailing in correctional settings dictates that prison staff and management ignore mistreatment of inmates and

refuse cooperation in investigations. Indeed, “[m]ost staff members would rather risk discipline than violate the code of silence within the correctional community; this silence protects wrongdoers.” *Comm’n Report, supra*, at 102; see also *Investigating Sexual Assaults, supra*, at 3, 15. As the OIG found, prison staff may even “cover for correctional staff who commit sexual abuse by serving as alibis or lookouts,” *Deterring Staff Sexual Abuse, supra*, at 12, just as the allegations in this case illustrate, J.A. 11, 71-72.

The challenges posed by investigating sexual abuse by staff lead to high rates of “unsubstantiated,” i.e., inconclusive, findings, *Comm’n Report, supra*, at 117—which was the result of the investigation into petitioner’s administrative complaint. J.A. 102. Only 11% of the investigations of criminal sexual abuse completed by the BOP between 2001 and 2008 had conclusive outcomes, with the remaining 89% being deemed unsubstantiated. *DOJ’s Efforts, supra*, at 60.

Significantly, as the National Prison Rape Elimination Commission has emphasized, “There is no reason to believe \* \* \* that extremely low substantiation rates are attributable to a high number of false allegations.” *Comm’n Report, supra*, at 118. Not only do staff perpetrators of sexual assault have tremendous inherent institutional advantages over inmates in the investigation process, but BOP investigative staff often lack adequate training, experience, and sensitivity to effectively investigate inmate reports of staff sexual abuse. *Id.* at 56-57; *Investigating Sexual Assaults, supra*, at 10, 15. A BOP Office of Internal Affairs review found that approximately one-third of staff sexual assault investigations by local BOP investigations were deficient. *DOJ’s Efforts, supra*, at 57.

Troublingly, prosecutions of perpetrators of sexual abuse remain relatively infrequent. Over an eight year period, U.S. Attorneys accepted only 102 staff sexual abuse cases referred for prosecution by the OIG. *DOJ's Efforts, supra*, at 63-64. An OIG report found that many Assistant U.S. Attorneys "did not appreciate the significance of staff-on-inmate sexual abuse cases." *Id.* at 75. According to the National Prison Rape Elimination Commission, "some prosecutors do not view incarcerated individuals as members of the community and as deserving of their services as any other victim of crime." *Comm'n Report, supra*, at 120.

Ultimately, the sad reality is that many federal inmates sexually brutalized by correctional officers have found neither protection nor justice from the government. Sexually abusive prison staff simply "'get away with it.'" *Investigating Sexual Assaults, supra*, at 13. Systemic government failings have left inmates at risk of staff sexual assaults and perpetrators undeterred. As the National Prison Rape Elimination Commission has concluded, "[t]here has been too little accountability for too long." *Comm'n Report, supra*, at 13.

**F. Access To The Courts For Victims Is Critical To Stem The Epidemic Of Prison Sexual Abuse**

This Court recently noted the critical role played by the judiciary to address severe abuses of basic human rights by government prison systems. See *Brown v. Plata*, 131 S. Ct. 1910, 1928-1929 (2011). This is particularly true in the context of a prison culture that has done too little to deter and punish inmate rapes perpetrated by law enforcement officers. As the National Prison Rape Elimination Commission emphasized, "If

prisoners are sexually abused because the correctional facility failed to protect them, they have a right to seek justice in court." *Comm'n Report, supra*, at 92.

Access to the courts is essential not only to vindicate the right of an individual prisoner, like petitioner, to be free of sexual abuse, but also to spur the systemic change necessary to reform a culture in which prison rape has been too long tolerated as a means to control incarcerated individuals. Federal inmates like petitioner must have access to the courts to ensure that the BOP lives up to PREA's zero-tolerance standard for prison rape and the newly-adopted regulations promulgated under it. In the words of the National Prison Rape Elimination Commission, "court orders have had an enormous impact on the Nation's jails and prisons \* \* \*. Beyond the reforms courts usher in, their scrutiny of abuses elicits attention from the public and reaction from lawmakers in a way that almost no other form of oversight can accomplish." *Comm'n Report, supra*, at 91.

The unanimous Congress that passed PREA in 2003 recognized that longstanding toleration of sexual assaults of prisoners both by other inmates and by prison staff has made this abuse a horrifically commonplace feature of incarceration. As the studies generated under PREA make clear, the days are over when prisoner allegations of rape by correctional officers can be disregarded as mere fabrications or a matter of no concern to the government that confines these inmates. Prisoner tort claims against the government for brutal sexual assaults by federal correctional employees cannot be dismissed wholesale as frivolous litigation to be barred at the courthouse door as a matter of sovereign immunity. As it is, the Prison Litigation Reform Act of 1995

("PLRA"), 42 U.S.C. 1997e *et seq.*, specifically enacted to "reduce the quantity and improve the quality of prisoner suits," *Porter v. Nussle*, 534 U.S. 516, 524-525 (2002), is a powerful check on unfounded prisoner sexual abuse claims. See, *e.g.*, *Comm'n Report, supra*, at 93 (PLRA hurdles "can block access to the courts for many victims of sexual abuse."). Interpreting Section 2680(h) contrary to its plain terms to foreclose tort claims for sexual assault against the U.S. government would cut off an important avenue of redress for well-founded claims of sexual abuse.

As Congress recognized in enacting PREA, the government bears responsibility for stemming staff sexual abuse of incarcerated individuals. Notably, the government itself acknowledges in this case that, under the terms of Section 2680(h) of the FTCA, the government has waived sovereign immunity from suits by federal inmates whose prison guards have raped them. Having "stripped" inmates "of self-protection and foreclosed their access to outside aid," *Farmer*, 511 U.S. at 825, the government should not be deemed immune from responsibility for sexual assaults by correctional officers wielding overwhelming power and control over all aspects of inmates' lives behind bars. Access to the courts to bring tort claims against the U.S. government is essential to vindicate the right of federal inmates to be safe from rape by their jailers.



## CONCLUSION

The judgment of the court of appeals should be vacated and remanded.

Respectfully submitted,

SUSAN L. SOMMER

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DECEMBER 2012



## **APPENDIX**

## APPENDIX

**Lambda Legal Defense and Education Fund, Inc.** ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of people who are lesbian, gay, bisexual, or transgender ("LGBT") and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has appeared in numerous cases in this Court addressing the legal rights of LGBT and HIV-affected individuals, and advocates against the epidemic of sexual violence in detention settings targeting those who are LGBT.

**Just Detention International** ("JDI") is a human rights organization dedicated to putting an end to sexual violence in all forms of detention. JDI has three core goals for its work: (1) to ensure government accountability for prisoner rape; (2) to transform public attitudes about sexual violence in detention; and (3) to promote access to resources for those who have survived this form of abuse. The organization provides expertise to lawmakers, officials, counselors, advocates, and reporters on issues pertaining to inmate safety and the obligations of corrections officials to prevent and respond to sexual abuse.

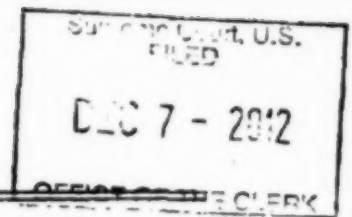
**National Center for Transgender Equality** ("NCTE") is a national social justice organization devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. Since 2003, NCTE has been engaged in educating legislators, policymakers, and the public, and advocating for laws and policies that pro-

mote the health, safety, and equality of transgender people. NCTE provides informational referrals and other resources to thousands of transgender people every year, including many individuals in prisons, jails, and civil detention settings, and has been extensively involved in efforts to implement the Prison Rape Elimination Act and other efforts to address the vulnerability of transgender people in confinement settings.

**Transgender Legal Defense & Education Fund** ("TLDEF") is committed to ending discrimination based upon gender identity and expression and to achieving equality for transgender people through public education, test-case litigation, direct legal services, community organizing, and public policy efforts. Transgender people are among society's most vulnerable groups, and nowhere is this more true than in the prison system. Studies have found that transgender people face extraordinarily high levels of discrimination and violence in prison, including at the hands of prison employees. Transgender people are therefore very concerned about their ability to hold prisons responsible for intentional torts committed against them.

**Women's Prison Association** ("WPA"), an advocacy and service organization committed to helping women with criminal justice histories, advocates on behalf of incarcerated women, including those who have been sexually abused. Through its Institute on Women & Criminal Justice, the WPA pursues a rigorous policy, advocacy, and research agenda and seeks to assure that women's voices are included in public debates on women and criminal justice systems.

**AMICUS  
CURIAE  
BRIEF**



**In The  
Supreme Court of the United States**

---

KIM MILLBROOK,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Third Circuit**

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**AMICUS CURIAE BRIEF FOR  
THE LEWISBURG PRISON PROJECT  
IN SUPPORT OF THE PETITIONER**

---

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**QUESTION PRESENTED FOR REVIEW**

Whether 28 U.S.C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to execute searches, to seize evidence, or to make arrests for violations of federal law.



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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Lewisburg Prison Project, Inc. is a non-profit organization that provides legal and other assistance to prisoners in the Middle District of Pennsylvania. The Prison Project is dedicated to the principle that prisoners are persons with incontestable rights to justice and compassion. It strives to provide safeguards for prisoners' constitutional and human rights by advocating for humane conditions in prison and by corresponding with incarcerated individuals about their difficulties. The Prison Project was founded in 1973 by concerned citizens of Lewisburg, Pennsylvania. It continues to operate with their support. The Prison Project has two staff members and relies largely on the assistance of volunteers.

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## SUMMARY OF THE ARGUMENT

Prisoners confined in the federal government's most restrictive penal institutions are uniquely vulnerable to abuse. In our constitutional system, the

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<sup>1</sup> Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.



awesome power of the national government holds itself in check through statutory constraints enforced by the courts. Scholars living outside prison walls have identified a conceptual tension between two principles: sovereign immunity and limited government.<sup>2</sup> For prisoners, that tension is visceral, not merely conceptual. A statute may be all that holds a potential abuser at bay.

The *Federal Tort Claims Act* (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, limits governmental power by waiving the United States' sovereign immunity from suit. Under certain conditions, this provides relief for federal prisoners abused by staff. The FTCA differs in one crucial respect from other statutes, regulations, and program statements that, at least on paper, require the Federal Bureau of Prisons (BOP) to keep prisoners safe, redress their grievances, and sanction their abusers.<sup>3</sup> The difference is that the FTCA gives abused prisoners themselves a means to seek redress for injuries – a means that also can deter abusive

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<sup>2</sup> See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201 (2001); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521 (2003).

<sup>3</sup> For example, the Bureau of Prisons shall "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042. Regulations implementing that duty are found at 28 C.F.R. §§ 500-572.40. The BOP puts the regulations into practice through detailed program statements, available at <http://www.bop.gov/DataSource/execute/dsPolicyLoc>.

conduct.<sup>4</sup> The availability of a remedy in tort for prisoners discourages prison staff from resorting to brutality in circumstances where fear or frustration might incline someone in that direction. So, it is vitally important to allow the FTCA to have the full range of application that was intended by Congress and set forth in the plain statutory language.

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## ARGUMENT

### **I. Federal Prisoners Remain Vulnerable To Abuse By Prison Staff Because Of Lax Enforcement Of Existing Law, Overcrowding, Understaffing, And Fear Of Retaliation For Reporting Abuse.**

Spontaneous empathy seldom greets the prisoner who, once convicted of a crime, returns to court as an injured party seeking relief in a civil suit. Nevertheless, prisoners in the United States retain their basic constitutional rights. As Justice O'Connor wrote, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). But injuries of constitutional proportions are not at issue here. This is a tort case. Some twenty years ago, Justice

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<sup>4</sup> Chemerinsky remarks that "[tort] liability is justified primarily based on two rationales: the need to provide compensation to injured individuals and the desire to deter future wrong-doing." Chemerinsky, *supra* note 2, at 1216.

Thomas remarked that a beating inflicted by prison staff was more appropriately viewed as tortious than as cruel and unusual punishment. *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting). The FTCA applies state tort law when a federal employee acting within the scope of their official duties injures someone, even in prison.<sup>5</sup>

Injuries, unfortunately including sexual abuse by prison staff, occur all too often throughout federal prisons. Policies banning the abuse of prisoners have failed. The Department of Justice (DOJ) conducted an in-depth review of its efforts to prevent sexual abuse by federal prison staff and found only “mixed” success.<sup>6</sup> For the period studied, FY 2001 through FY 2008, the DOJ reported that it had received 1,585 allegations of staff sexual abuse at the 115 institutions managed by the BOP across the country.<sup>7</sup> In addition to that number, the DOJ found that many more allegations of staff sexual abuse were made to BOP institutional staff but not passed on to the DOJ.<sup>8</sup> This was because many allegations were dismissed locally and “some BOP staff members may be confused about the need

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<sup>5</sup> 28 U.S.C. § 1346(b)(1).

<sup>6</sup> U.S. Department of Justice, Office of the Inspector General, *The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates*, Report Number I-2009-004 (2009), available at <http://www.justice.gov/oig/reports/plus/e0904.pdf> [hereinafter *DOJ Report*] iii, 79.

<sup>7</sup> *DOJ Report* 87.

<sup>8</sup> *DOJ Report* 41.

to report all allegations to the BOP's OIA [Office of Internal Affairs] and the OIG [Office of the Inspector General of the DOJ]."<sup>9</sup> Thus, the DOJ acknowledges that its statistics, troubling as they are, fall short of the number of accusations actually filed by inmates.

Moreover, abusive incidents often go unreported. Some federal prison administrators effectively discourage inmates from reporting sexual abuse by staff because of procedures that appear to punish the accuser. The DOJ found that the burden of separating victim and abuser fell disproportionately upon the victim in some prisons, which

routinely protected alleged victims from potential further abuse by segregating them from the general prisoner population, isolating them in a special housing unit or local jail, and then transferring them to another prison as soon as possible. Those actions, while intended to protect the victims from additional abuse, often disadvantaged the prisoner victims and made other inmates reluctant to report abuse because they regarded those actions as punishment.<sup>10</sup>

Instead of automatically isolating the accuser, the DOJ noted that the BOP has other options, such as "changing the accused staff member's work assignments and duty station or placing the staff member

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<sup>9</sup> DOJ Report 41.

<sup>10</sup> DOJ Report 34.

on home duty pending completion of the investigation."<sup>11</sup> But those alternatives often are not even considered, so the pattern continues: "Isolated segregation and transfers disadvantage victims and inhibit reporting."<sup>12</sup>

Thus, only a fraction of prisoner abuse cases are ever reported. In reported cases, investigations seldom result in findings that can support prosecution or disciplinary action. The DOJ found that BOP investigators reached conclusive results in only 10 percent of the allegations that they looked into, while fully 90 percent could not be resolved.<sup>13</sup> The DOJ identified several factors that contributed to this disappointing fact. Crime scene evidence that would support an allegation of sexual abuse often is not gathered in the prison setting, either because investigators lack time and training to do it properly, or because victims do

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<sup>11</sup> *DOJ Report 35*. The options were set forth in BOP Program Statement 5324.06, *Sexually Abusive Behavior Prevention and Intervention Program*. This policy was revised as of Aug. 20, 2012, and is available as Program Statement 5324.09 at <http://www.bop.gov/DataSource/execute/dsPolicyLoc>.

<sup>12</sup> *DOJ Report 34, 35*.

<sup>13</sup> *DOJ Report 60*. Other agencies, which sometimes investigate allegations of prison staff sexual abuse, achieve somewhat higher rates of success. OIG Special Agents failed to reach conclusive results in 56 percent of their cases. They substantiated the allegations in 43 percent and conclusively disproved them in 1 percent. The few investigations conducted by the FBI were inconclusive in 80 percent of cases but confirmed the allegations in the other 20 percent. *Id.* at 58-59.



not come forward immediately.<sup>14</sup> Delayed reporting means that “victims’ memories of the incidents may blur and they may forget important details.”<sup>15</sup> While delay can make it impossible for investigators to determine what happened, prisoners may delay reporting abuse for the same reason they hesitate to report it at all: fear of retaliation, isolation, or relocation.

Non-enforcement of federal criminal statutes enables staff to assault and abuse prisoners with impunity. The DOJ documented reluctance on the part of some government attorneys to prosecute prison staff for sexual abuse of inmates. While most violations of the BOP policy against sexual misconduct are felonies under 18 U.S.C. §§ 2241-2245,<sup>16</sup> prosecutors say that “[prison] staff sexual abuse cases often have limited jury appeal.”<sup>17</sup> To overcome prosecutorial reluctance

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<sup>14</sup> *DOJ Report* 55-57.

<sup>15</sup> *DOJ Report* 55.

<sup>16</sup> *DOJ Report* 19.

<sup>17</sup> *DOJ Report* 63. Nevertheless, “[a]cceptance of staff sexual abuse cases for prosecution has increased since enactment of stricter laws in 2006.” *Id.* “On January 5, 2006, the *Violence Against Women and Department of Justice Reauthorization Act of 2005* [18 U.S.C. §§ 2241-2244 and § 1791] increased the maximum criminal penalty for sexual abuse of a ward from 1 to 5 years and the maximum penalty for abusive sexual contact with a federal inmate without the use of threat or force from 6 months to 2 years. The crimes, which had formerly been misdemeanors, became felonies. On July 27, 2006, the *Adam Walsh Child Protection and Safety Act of 2006* [Pub. L. No. 109-248, 120 Stat. 587] further increased the maximum penalties for sexual abuse of a ward to 15 years.” *Id.*



and jury apathy, the DOJ emphasized that sexual abuse of prisoners seriously compromises security, encourages trafficking in contraband, and establishes a regime of lawlessness undermining the prison administration.<sup>18</sup> For example, successful prosecution has focused on

policy violations and illegal activity that the staff members committed to facilitate the sexual abuse and to remain undetected. . . . [Thus,] prosecutors were able to portray the correctional officers' actions as a conspiracy that involved collusion, witness tampering, and security breaches and not merely sexual contact with inmates.<sup>19</sup>

Still, prosecutors routinely decline prison staff sex abuse cases for one overriding reason. By definition, the victim and any prisoner witnesses have criminal records, while the accused does not. Prosecutors assume that this fact alone may be sufficient to persuade judge and jury to credit the testimony of prison staff and disbelieve the prisoners.<sup>20</sup>

Because policies, regulations, and statutes designed for prisoner protection so seldom achieve their purpose, federal prisoners need the self-help option of the tort remedy that Congress provided in the FTCA as a means of deterring sexual abuse by staff.

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<sup>18</sup> DOJ Report 75.

<sup>19</sup> DOJ Report 76.

<sup>20</sup> DOJ Report 74.

**A. When Government Power Over Personal Freedom Is At Its Zenith, As In USP Lewisburg's Special Management Unit, The Need For Judicial Oversight Is Greatest.**

One can hardly imagine a deeper incursion of government power into the realm of personal liberty than the security practices in the Special Management Unit (SMU) at Lewisburg.<sup>21</sup> But our democratic society guarantees some liberties even to prisoners, and we task prisons with the duty to protect their inmates. If guards cannot be made to answer for abusing prisoners, the ideal of equality under law is diminished.

Sovereign immunity has to do with the power of the federal courts, that is, the judiciability of claims against the United States. As one constitutional scholar explains, sovereign immunity "is invoked to bar courts entirely from hearing some individual claims of legal wrongs."<sup>22</sup> The FTCA's waiver of sovereign immunity has the effect of restoring the federal courts' power to implement remedies for wrongs committed by federal employees, including BOP

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<sup>21</sup> Only in wartime, when a soldier may be drafted against his will and ordered to give up his life for his country, does the government override personal liberty more completely.

<sup>22</sup> Jackson, *supra* note 2, at 527. Professor Jackson, viewing sovereign immunity in historical perspective, remarks, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 532.

personnel, with a few exceptions. In this way, Congress reaffirmed the constitutional role of the courts as a check upon the power of the Executive Branch, including the DOJ and the BOP. Thus, to constrict the coverage of the FTCA, as the Third Circuit did in *Pooler v. United States*, 787 F.2d 868 (3d Cir. 1986), diminishes the judiciary's constitutional role and hampers the ability of the courts to redress governmental wrongdoing.

**B. Overcrowding And Staff Shortages In  
The Federal Prisons Defeat Government  
Efforts To Stop Sex Abuse By Prison  
Staff.**

The "mixed" success of administrative and prosecutorial efforts to eliminate staff sexual abuse of federal prisoners is amply documented in the DOJ Report discussed above. Exacerbating the situation is the growth of the federal prisoner population while funding for staff and facilities comes up short. When correctional staff see their numbers stretched thin in overcrowded cell blocks, they too often resort to intimidation of prisoners through physical brutality. Abuse becomes just another available method for asserting dominance and maintaining control in severely stressed circumstances.

Overcrowding is a matter of definition. In a recent investigation, the U.S. Government Accountability Office looked at population trends in the federal

prisons.<sup>23</sup> No matter which metric the GAO applied, it found evidence of a system seriously stressed both by steady growth in numbers and by the stop-gap solutions that the BOP has devised when given resources inadequate for its task.

The federal prison population grew by 9.5 percent between 2006 and 2011, but the capacity of the system grew by only 7 percent.<sup>24</sup> Criteria for setting the “rated capacity” of a prison facility are fluid. In the GAO’s terms, “[r]ated capacity is the maximum population level at which an institution can make available basic necessities, essential services (e.g., medical care), and programs (e.g., drug treatment, basic education, and vocational education.)”<sup>25</sup> While there is no objective measure for this, the BOP acknowledges the longstanding spatial standard of “35 square feet of unencumbered space per inmate.”<sup>26</sup> The configuration of bed space is not uniform across facilities built in different eras.<sup>27</sup> Nevertheless, in 1991 the BOP set up arbitrary guidelines for the proportion of cells at each

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<sup>23</sup> U.S. Government Accountability Office, *Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*. Report to Congressional Requesters (September 2012), available at <http://www.gao.gov/products/GAO-12-743>. [hereinafter *GAO Report*].

<sup>24</sup> *GAO Report* at 12.

<sup>25</sup> *GAO Report* at 2 n.5.

<sup>26</sup> *GAO Report* at 8, citing a requirement set in 1990 by the American Correctional Association.

<sup>27</sup> *GAO Report* at 19.

security level that could accommodate double bunks.<sup>28</sup> Those guidelines are used as the current baseline, so that “crowding” simply means the extent to which an institution exceeds the guidelines. The GAO found that, system-wide, crowding rose from 36 to 39 percent between 2006 and 2011, with some sectors even higher.<sup>29</sup> Extra beds may be added to cells or to areas formerly used for other purposes, at the discretion of wardens.<sup>30</sup> The third bed in a shared cell and all the beds in non-cell space are called “temporary beds,” yet they comprised 29 percent of accommodations in male high-security prisons in 2011.<sup>31</sup>

The compression of more inmate bodies into existing or newly built spaces solves the problem of where to put prisoners, but in turn it creates further difficulties. The GAO remarks that “triple-bunking all cells in a unit presents a challenge to staff who have to manage the large number of inmates.”<sup>32</sup> To augment the numbers of correctional officers, then, prisons may reassign professional staff who otherwise would be providing educational or counseling services.<sup>33</sup> Larger populations mean “crowded bathroom facilities, reductions in shower times, shortened meal

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<sup>28</sup> GAO Report at 9.

<sup>29</sup> GAO Report at 14-15.

<sup>30</sup> GAO Report at 18.

<sup>31</sup> GAO Report at 18.

<sup>32</sup> GAO Report at 19.

<sup>33</sup> GAO Report at 24.

times coupled with longer waits for food service, and more limited recreational activities."<sup>34</sup> Wear and tear on facilities increases accordingly.<sup>35</sup> Although federal law requires prisoners to work, there are not enough jobs to go around, and many inmates are idle.<sup>36</sup>

The stage is set for trouble. If prisoners feel stress, correctional officers feel it even more. Crowded conditions, with a heightened ratio of prisoners to staff, depress the officers' morale and multiply opportunities for them to flout rules with impunity. Supervisors struggle to keep up with their responsibilities to train and monitor junior staff. The GAO Report describes a situation where security procedures designed to prevent prisoner abuse are strained to the breaking point.<sup>37</sup>

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<sup>34</sup> *GAO Report* at 19.

<sup>35</sup> *GAO Report* at 25.

<sup>36</sup> *GAO Report* at 21.

<sup>37</sup> The *GAO Report* is cited here principally to document prison overcrowding. The report goes on to address the problem. It concludes that "options that will be important to consider include (1) reducing the size of the projected inmate population by reforming sentencing laws, allowing alternatives to incarceration, and/or providing BOP greater sentencing flexibility; (2) increasing capacity in the federal system by constructing new prisons, contracting for additional private capacity, and adding additional staff; or (3) taking some combination of both approaches." *GAO Report* at 40.



**C. The Special Management Unit At USP Lewisburg Imposes Severe Limits On The Personal Liberty Of Prisoners That Expose Them To Heightened Risk Of Physical Abuse By Staff.**

The Petitioner was assaulted while housed in the Special Management Unit at the United States Penitentiary at Lewisburg. An SMU combines extremely restrictive physical control with a four-step program that is supposed to impart interpersonal skills enabling a prisoner to coexist peacefully with others. At USP Lewisburg, approximately 1,100 prisoners are in lockdown in the SMU. They are double-celled 24 hours a day except for one hour of recreation five days a week. Life for a prisoner in the SMU is supposed to be governed by policies set forth in a BOP program statement.<sup>38</sup> But certain specific details are unpublished; they are known to *Amicus* through several years of correspondence with numerous prisoners who provide similar descriptions of their SMU experiences.

Controlling gangs, or at least leveraging their power, is the purpose of the SMU. Prisoners are sent there when suspected of leadership or participation “in disruptive geographical group/gang-related

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<sup>38</sup> U.S. Department of Justice, Federal Bureau of Prisons, *Special Management Units*, Program Statement No. 5217.01 (2008) [hereinafter *SMU Program Statement*].

activity.”<sup>39</sup> There are many prison gangs. Their members wage war according to a complex code of expected behaviors and a shifting pattern of alliances. In some circumstances, the gang code requires a prisoner to assault a member of an enemy gang on sight as soon as he has an opportunity to do so; if he does not, then he in turn will be targeted for a brutal assault.

Prison staff, understanding full well the power of this gang code, cite it to justify their practice of constantly restraining prisoners. Warring gang members must never find themselves face to face without restraints. In theory, the BOP monitors current enemies, and knows who must be kept apart, through its Central Inmate Monitoring System (CIM).<sup>40</sup> In practice, the ubiquity of gangs, their variety, and their shifting alliances – together with the shortage of staff – have led the BOP to institute draconian restraint procedures. Quite simply, in the SMU a prisoner is never out of handcuffs unless he is locked in his cell or in a

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<sup>39</sup> *SMU Program Statement* § 2. A prisoner can also be consigned to the SMU for having disrupted operations at another prison or “[o]therwise participated in or [being] associated with activity such that greater management of the inmate’s interaction with other persons is necessary to ensure the safety, security, or orderly operation of [BOP] facilities, or protection of the public.”

<sup>40</sup> U.S. Department of Justice, Federal Bureau of Prisons, *Central Inmate Monitoring System*, Program Statement No. 5180.05 (2007). See also *SMU Program Statement* § 4, which coordinates CIM classifications with SMU levels.

recreation cage. He is locked in his cell at all times except for five hours a week in the recreation cage.<sup>41</sup>

Whenever staff remove a prisoner from his cell, he first extends his hands through the food tray slot in the door to be cuffed. This practice, instituted because of the unique security needs of the SMU, makes prisoners vulnerable to abuse by staff in the manner described by Petitioner. J.A. 12, 36, 45-46, 60-62, 72-73.<sup>42</sup> When in restraints, a prisoner poses no threat to staff, but neither can he defend himself against assault.

By design, prisoners in the Lewisburg SMU are rendered physically helpless at the hands of staff. The practice of constantly applying restraints creates opportunities for assault by staff, including sexual abuse. Prison staff continue to sexually abuse prisoners, as indicated by the DOJ Report discussed above. Given the ineffectiveness of steps taken by the BOP to safeguard prisoners against staff sex abuse in this vulnerable situation, it is imperative that courts not shut the door on prisoner tort complaints by narrowing the coverage of the FTCA. If only for their

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<sup>41</sup> *SMU Program Statement* § 5.a(7). Meals, washing, and toilet use occur in the cell, typically in the presence of a cellmate.

<sup>42</sup> In certain circumstances, along with handcuffs chained to a belt around the waist, a prisoner may be double-cuffed and shackled before being moved. This is done for prisoners who have assaulted a staff member or who are thought to have a gang affiliation with someone who committed such an assault.

possible deterrent effect, prisoner tort claims against abusive guards must be heard.

## **II. Protective Statutes, Regulations, And BOP Policies Do Not Eliminate The Need For The Tort Remedies Provided By Congress In The FTCA.**

Action in tort under the FTCA is often the best (and sometimes the only) avenue of relief open to a federal prisoner who has been sexually abused by prison staff. Torts occur when injury is caused by breach of duty. Without question, the BOP has a duty to protect the wellbeing of prisoners consigned to its custody. The BOP "shall . . . provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(3). Regulations implementing that duty are found chiefly at 28 C.F.R. §§ 500-572.40. The BOP undertakes to put the regulations into practice through its detailed program statements.<sup>43</sup> Even so, duty is not fulfilled simply by being acknowledged and described on paper.

New laws bring new regulations and policies in their wake, but they do not bring about change unless they are enforced and obeyed. For example, the *Prison Rape Elimination Act* was passed in 2003, almost ten years ago, to "establish a zero-tolerance standard

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<sup>43</sup> BOP Program Statements are available at <http://www.bop.gov/DataSource/execute/dsPolicyLoc>.

for the incidence of prison rape in prisons in the United States [and] make the prevention of prison rape a top priority in each prison system.” 42 U.S.C. § 15602. Extensive regulations subsequently issued from the DOJ and are to be found at 28 C.F.R. §§ 115.5-501. In their current version, they went into effect in June 2012.<sup>44</sup> The BOP then revised and expanded its own policy by issuing a program statement on August 20, 2012.<sup>45</sup> Each federal prison now “shall provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.” 28 C.F.R. § 115.51(a). The particulars of those “multiple internal ways” of reporting in the SMU context have not yet been published.<sup>46</sup> Here too, describing a duty does not guarantee that no breach will occur. The need for a tort remedy remains.

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<sup>44</sup> Att’y Gen. Order 3331-2012, 77 Fed. Reg. 37197-37232 (June 20, 2012).

<sup>45</sup> U.S. Department of Justice, Federal Bureau of Prisons, *Sexually Abusive Behavior Prevention and Intervention Program*, Program Statement No. 5324.09 (August 20, 2012).

<sup>46</sup> If the BOP follows the new regulations, it must stop automatically isolating and removing prisoners who report abuse. The BOP “shall employ multiple protection measures, such as housing changes or transfers for inmate victims or abusers, removal of alleged staff or inmate abusers from contact with victims, and emotional support services.” 28 C.F.R. § 115.67(b). Particulars for the SMU are not yet announced.



The new regulations and BOP policies are designed to deter staff sexual abuse of prisoners. Only time will tell whether they succeed where previous regulations and policies met with only "mixed" success, according to the DOJ Report discussed above. Yet, like the former regulations, the new ones do nothing to compensate a victim for his injuries. Therefore, the FTCA remains an essential tool in the hands of victimized prisoners; its application should not be narrowed.

**A. When Abuse Occurs, It Is Difficult For A Federal Prisoner To Obtain Relief In A Civil Rights Action Because Of Preconditions Imposed By The *Prison Litigation Reform Act*.**

Apart from a tort action under the FTCA, a federal prisoner who suffers abuse by staff can bring a civil rights action for violation of constitutional rights under the *Bivens* doctrine.<sup>47</sup> But he finds a formidable roadblock in his way. Congress passed the *Prison Litigation Reform Act* (PLRA) in 1996 to discourage prisoners from bringing frivolous lawsuits in federal

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<sup>47</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In the Third Circuit, as elsewhere, "courts have generally relied upon the principles developed in the case law applying section 1983 [of the *Civil Rights Act of 1871*] to establish the outer perimeters of a *Bivens* claim against federal officials." *Schrob v. Catterson*, 948 F.2d 1402, 1409 (3d Cir. 1991). Juries often are unsympathetic to prisoners who bring constitutional claims.



court. The so-called exhaustion requirement of the PLRA is codified at 42 U.S.C. § 1997e(a): “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”

Therefore, a federal prisoner cannot bring a civil rights action without first timely fulfilling each of the steps set forth in the BOP’s Administrative Remedy Program.<sup>48</sup> There are four. An initial informal request, if denied, must be followed up within 20 days of the injury by submission of an appeal on form BP-9 to the warden. The warden has 20 days to respond, and a lack of response within 40 days is a denial. Upon denial at the institutional level, the prisoner appeals by submitting form BP-10 to the regional director. The regional director has 30 days to respond, and a lack of response within 60 days is a denial. Upon denial at the regional level, the prisoner appeals by submitting form BP-11 to the BOP general counsel. The general counsel has 40 days to respond, and no response within 60 days is a denial. Moreover, at each level, copies of the request and denial at the previous level must be attached to the appropriate form, with supporting exhibits.

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<sup>48</sup> U.S. Department of Justice, Federal Bureau of Prisons, *Administrative Remedy Program*, Program Statement No. 1330.17 (August 20, 2012). The steps listed here are prescribed in sections 8, 9, and 12 of the Program.

Most prisoners find this process daunting, if not impossible, to complete. In addition, *Amicus* frequently receives correspondence from prisoners at USP Lewisburg stating that they are afraid to file a grievance because prison staff invariably learn of any complaints and retaliate. Prisoners also state that the institution has lost or mishandled paperwork or has restricted access to photocopying facilities. Thus, failure to exhaust administrative remedies often eliminates the possibility of a *Bivens* action.

While the FTCA imposes an exhaustion requirement as well, it is much less onerous. The PLRA does not apply. Before suing under the FTCA, a prisoner need only submit his claim to the BOP and have it denied or have six months elapse without a response. 28 U.S.C. § 2675(a). Thus, the FTCA offers a means of redress for an injured prisoner who has failed to navigate successfully through the convoluted and time-sensitive steps of the BOP's Administrative Remedy Program, whether because he reasonably feared retaliation or for another reason. Access to this relief should not be unduly narrowed.

**B. Prisoners Seldom Succeed In Obtaining The Relief That Is Ostensibly Available Through The BOP's Administrative Remedy Program.**

*Amicus* does not have access to data showing how often prisoners receive relief for their injuries by using the BOP's Administrative Remedy Process. However,

correspondence from prisoners clearly indicates that the overwhelming majority of them find the process to be frustrating and ultimately ineffective, even apart from the roadblock it poses to litigation.

An additional indication of the futility of the Administrative Remedy Program for addressing injuries inflicted by prison staff is the fact that the new BOP policy on sex abuse does not even incorporate it. Instead, as discussed above, the BOP's August 2012 *Sexually Abusive Behavior Prevention and Intervention Program* vaguely promises "multiple internal ways" to file complaints about staff sexual abuse — ways as yet unspecified. 28 C.F.R. § 115.51(a). Apparently, new rules will be announced. But the new rules will not be any more breach-proof than the old ones were. Prisoners will still need access to a remedy in tort as a means of encouraging the BOP to do its duty and abide by its own policies. *Amicus* urges the Court not to deprive prisoners of the full range of tort remedies that Congress intended to provide for them in the FTCA.

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## CONCLUSION

In spite of legislation, regulations, and policies designed to protect federal prisoners from wrongful treatment, the unfortunate reality is that abuses continue to occur. The *Federal Tort Claims Act*, fairly interpreted, enables prisoners and others to obtain relief for injury inflicted by federal employees, including

assault by law enforcement officers. Thus, it also serves to deter wrongful behavior and signifies the commitment of a democratic society to lawful limitations on government power. Therefore, the Lewisburg Prison Project as *Amicus Curiae* urges the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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December 7, 2012

**AMICUS  
CURIAE  
BRIEF**

**In The  
Supreme Court of the United States**

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**KIM MILLBROOK,**

*Petitioner,*

**v.**

**UNITED STATES OF AMERICA,**

*Respondent.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit**

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**BRIEF OF THE RUTHERFORD INSTITUTE  
AMICUS CURIAE IN SUPPORT OF THE  
PETITIONER**

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**QUESTION PRESENTED**

1. Whether 28 U.S.C. §§1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of federal law."

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## INTEREST OF AMICUS<sup>1</sup>

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute champions accountability of the government for abuses of power. It is particularly important that responsibility extend to the intentional torts of corrections officers, such as sexual assault, upon the person of sentenced inmates who are at the mercy of such officers. The government must have every incentive to prevent and punish those who commit sadistic and perverted acts upon those under their control.

## SUMMARY OF THE ARGUMENT

Read together, 28 U.S.C. §§1346(b) and 2680(h) (herein the "Exception Clauses") waive the sovereign immunity of the United States for the intentional torts of prison guards when they are

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<sup>1</sup> Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief, and letters indicating that consent have been submitted with this brief.

acting within the scope of their employment. The text of the Exception Clauses is plain, unambiguous, and must be applied and enforced as written. Judicial amendment, by reading in words that limit the activities to which the intentional torts waiver applies, results in a distortion of the statutory text that contravenes the intent of Congress. The Federal Torts Claim Act (herein the "FTCA") waives immunity for specifically enumerated intentional torts committed by investigative or law enforcement officials acting within the scope of his or her office or employment, provided two conditions are met: (1) the perpetrator's wrongful act fits into one the enumerated intentional torts, such as assault and battery; and (2) the perpetrator falls within the class of federal employees or office holders that is invested with the legal powers to make arrests for violations of federal law, to seize evidence or to execute searches, such as a prison guard. Nothing in the text of the Exception Clauses requires that the wrongful act must occur in the execution of specified duties, *i.e.*, making an arrest, seizing evidence, or executing a search. The Third Circuit erred in continuing to follow the circuit precedent established in *Pooler v. United States*, 787 F.2d 868 (3d 1986), and should have followed authority from other circuits that has properly construed the Exception Clauses. See *Ignacio v. United States*, 674 F.3d 252, 255 (4<sup>th</sup> Cir. 2012), *Reynolds v. United States*, 549 F.3d 1108, 1114 (7<sup>th</sup> Cir. 2008), *Ortiz v. United States*, 88 F. Supp. 2d 151 (S.D.N.Y. 2000), and *Harris v. United States*, 677 F. Supp. 403 (W.D.N.C. 1988).

## ARGUMENT

### **The *Pooler* Interpretation of the Exception Clauses Violates Fundamental Canons of Statutory Construction.**

The Court in *Pooler* began with a plain and unambiguous legal text and added in the words "in the course of" to extend immunity for wrongful intentional torts and to narrowly construe the Exception Clauses. Not only does the *Pooler* interpretation of the Exception Clauses deny justice to victims of sexual assault committed by brutal prison guards, the *Pooler* approach violates fundamental canons of statutory construction. This leads to absurd results. Indeed, *Pooler* eliminates the waiver of immunity for malicious prosecution, since malicious prosecution must occur "in the course of" making an arrest, seizing evidence, or executing a search.

In *Pooler*, Circuit Judge Gibbons barred claims brought under the FTCA on the ground the Exception Clauses did not apply to a law enforcement officer's tortious acts that were not done "in the course of" performing specified duties. In reaching this conclusion, Judge Gibbons disregarded the plain meaning of the Exception Clauses and proceeded directly to a consideration of the "sparse legislative history" relating to the 1974 amendments to the FTCA that enacted the Exception Clauses. Judge Gibbons wrote as follows:

In this case, *Pooler's* and *Bradley's* complaints, read in the light most favorable to them, charge that Kimmel is an officer of the United States



"empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law." 28 U.S.C. § 2680(h). No matter how generously we read them, however, the complaints do not charge that Kimmel committed an intentional tort while executing a search, seizing evidence, or making an arrest. We read the 1974 amendment to section 2680(h) as addressing the problem of intentionally tortious conduct occurring in the course of the specified government activities. It is in the course of such activities that government agents come most directly in contact with members of the public. The government places them in such a position, thereby exposing the public to a risk that intentionally tortious conduct may occur. That Congress intended to deal only with conduct in the course of a search, a seizure, or an arrest is confirmed by the sparse legislative history of the 1974 amendment. The Senate Report on the amendment states that the proviso was enacted to provide a remedy against the United States in situations where law enforcement officers conduct "no-knock" raids or otherwise violate the fourth amendment. *See* S.Rep. No. 588, 93d Cong., 2d Sess. 2-3 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 2789, 2790-91.

Reading the intentional tort proviso as limited to activities in the course of a search, a seizure or an arrest as a practical matter largely eliminates the likelihood of any overlap between section 2680(a) and section 2680(h). It is hard to imagine instances in which the activities of officers engaging in searches, seizures or arrests would be anything other than operational. When this court is presented with an instance to the contrary, it can address the question answered by the District of Columbia Court of Appeals in *Gray[v. Bell]*, 712 F.2d 490 (D.C. Cir. 1983)]. For present purposes, we hold only that the Pooler and Bradley complaints do not state claims falling within the proviso to section 2680(h) because no federal officer is charged with a tort in the course of a search, a seizure, or an arrest.

Not everyone on the *Pooler* panel agreed fully with Judge Gibbons. In a concurring opinion, Judge Seitz took issue with Judge Gibbons's reasoning and reached the opposite conclusion regarding the effect of the Exception Clauses, writing that "Congress intended § 2680(h) to encompass activities outside the arrest, search, and seizure context." *Pooler*, 787 F.2d at 874 (Seitz, J., concurring).

In *Ortiz v. United States*, *supra*, District Court Judge Kimba M. Wood adopted the entirety of a magistrate's report and recommendation which rejected the *Pooler* court's reconstruction of the

Exception Clauses. The magistrate judge set forth his reasons as follows:

[T]his Court finds itself in disagreement with *Pooler*, since, without any principled underpinning, the Third Circuit's view would render Section 2680(h) inapplicable to many legitimate complaints that corrections officers used excessive force against inmates in circumstances which do not involve a search, seizure or arrest. It also distorts the plain language of the statute, which, on its face, does not require that the law enforcement officer be engaged in one of the enumerated acts at the time of the alleged wrongdoing. The statute is unambiguous in waiving the Government's immunity with respect to any claim arising out of an assault committed by a federal law enforcement officer. It only references searches, seizures and arrests in attempting to define who may be considered a federal law enforcement officer. It would have been easy enough for Congress to have provided that it was waiving immunity with regard to acts of law enforcement officers only *while* such officers are executing searches, seizures or arrests. Congress failed to do so, choosing instead to waive immunity for certain intentional torts, including assaults, committed by law enforcement officers who have the authority to make searches, seizures and arrests.

Moreover, as another court has observed, under the *Pooler* interpretation, the provision of the statute waiving immunity as to claims of malicious prosecution would be rendered meaningless, because it is difficult to conceive of how a federal official could commit the acts constituting malicious prosecution in the course of an arrest, search or seizure.

Furthermore, because the language of § 2680(h) is unambiguous, the sparse legislative history that the Third Circuit relied upon in reaching a contrary position is irrelevant. It is black letter law that a court should not resort to legislative history unless a statute is ambiguous. See *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999); *Greenery Rehabilitation Group, Inc. v. Hammon*, 150 F.3d 226, 231 (2d cir. 1998).

*Ortiz*, 88 F. Supp. 2d at 164-65.

District Court Judge Wood emphatically declared her agreement with the magistrate judge that *Pooler* was wrongly decided:

The Court adopts the Report's thoroughly reasoned conclusion that the FTCA's waiver of sovereign immunity for law enforcement officers' intentional torts is not limited to torts committed in

the course of a search, seizure, or arrest. First, the plain language of the provision at issue distinguishes between the *acts* for which immunity is waived—"assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution"—and the class of *persons* for whose acts immunity is waived—officers "empowered by law to execute searches, to seize evidence, or to make arrests." 28 U.S.C. § 2680(h); *accord Crown v. United States*, 659 F. Supp. 556, 570 (D. Kan. 1987); *Harris v. United States*, 677 F. Supp. 403, 405 (W.D.N.C. 1988). Second, the legislative history makes clear that Congress did not intend to limit the waiver to torts arising from activities subject to Fourth Amendment scrutiny, notwithstanding the fact that the legislation was motivated by particular instances of such activity. *See* S. Rep. No. 93-588 at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 (noting that the provision "would submit the Government to liability whenever its agents . . . injure the public through [illegal] search and seizures" but that the "amendment should not be viewed as limited to constitutional tort situations"); *Harris*, 677 F. Supp. at 404-05; *cf. Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1988)("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is

ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

The authorities cited by defendants do not compel another result. Defendants rely on the Third Circuit’s decision in *Pooler v. United States*, 787 F.2d 868 (3d Cir. 1986), which held that § 2680(h) addresses only “conduct in the course of a search, a seizure, or an arrest.” *Id.* at 872. For the reasons stated above and discussed fully in the Report, the Court concludes that *Pooler* was wrongly decided and instead follows the broader interpretation given § 2680(h) by all other federal courts to consider the issue, including the D.C. Circuit. See *Sami v. United States*, 617 F.2d 755, 764-65 (D.C. Cir. 1979); *Employers Ins. Of Wausau v. United States*, 815 F. Supp. 255 (N.D. Ill. 1993); *Harris*, 677 F. Supp. 403; *Crow*, 659 F. Supp. 556.

*Ortiz*, 88 F. Supp. 2d 154-55.

In *Harris v. United States*, *supra*, Chief Judge Potter of the Western District Court of North Carolina, permitted the mother of an inmate to sue the government under the FTCA for the wrongful death of her son, allegedly as a consequence of an assault committed by a prison guard. The government moved for summary judgment to dismiss the claim, citing *Pooler* and the fact that the prison guard was not making an arrest, seizing



evidence or executing a search in connection with the assault. The Chief Judge Potter rejected *Pooler*, on the primary ground of erroneous statutory construction:

The language of the proviso itself supports a construction contrary to that taken by the Third Circuit. It would have been an easy matter for Congress to have worded the proviso "That, with regard to acts or omissions of law enforcement officers of the United States Government occurring while such officers are executing searches, seizures, or arrests. . . ." Such wording would have clearly limited the waiver of sovereign immunity as the Third Circuit has interpreted it. But Congress did not so limit the proviso. Rather, it provided that the Government waives sovereign immunity against liability for certain intentional torts committed by any of its agents who have the authority to execute searches, seize evidence, or make arrests. There is no limitation on the particular context in which the tort is committed. The only requirements are that the act complained of constitute one of the enumerated intentional torts, and that the officer committing the act fit the definition of "investigative or law enforcement officer." Both requirements are satisfied here.

*Harris*, 677 F. Supp. at 405. In denying the government's motion, Chief Judge Potter referred to

other District Courts that also disapproved of *Pooler* and the idea that the Exception Clauses only allow FTCA intentional tort claims against law enforcement officers engaged in searches, seizures, or arrests. *Harris*, 677 F. Supp. at 406 (citing *Crow*, 659 F. Supp. at 570-71, and *Picariello v. Fenton*, 491 F. Supp. 1026, 1037 (M.D. Pa. 1980)).

The most recent authority on the proper construction of the Exception Clauses is the Fourth Circuit's decision in *Ignacio v. United States*, *supra*. There, a civilian government security contractor who alleged he was assaulted by a Pentagon police officer. Circuit Judge Floyd held that the Exception Clauses waive sovereign immunity whether or not the law enforcement officer was in the course of making an arrest, seizing evidence, or executing a search, when that officer commits an assault in the course of his or her employment or office. Judge Floyd observed that the starting point for analyzing the scope and effect of the Exception Clauses is the statutory text:

We review questions of statutory interpretation de novo. *United States v. Ide*, 624 F.3d 666, 668 (4<sup>th</sup> Cir. 2010). "The starting point for any issue of statutory interpretation . . . is the language of the statute itself." *United States v. Bly*, 510 F.3d 453, 460 (4<sup>th</sup> Cir. 2007). "In that regard, we must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute . . . and our inquiry must cease if the statutory language is

unambiguous and the statutory scheme is coherent and consistent.” *Id.* (omission in original) (quoting *United States v. Hayes*, 482 F.3d 749, 752 (4<sup>th</sup> Cir. 2007), *rev’d on other grounds*, 555 U.S. 415 (2009)) (internal quotation marks omitted). “We determine the ‘plainness or ambiguity of statutory language . . . by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” *United States v. Thompson-Riviere*, 561 F.3d 345, 354-55 (4<sup>th</sup> Cir. 2009) (omission in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).”

*Ignacio*, 674 F.3d at 254.

In a direct rebuke of the *Pooler* Court, Judge Floyd strongly condemned courts that inject words of their own choosing into the text of a statute that is clear and unambiguous, by surmising what the legislature may have intended:

“[C]ourts must construe statutes as written, [and] not add words of their own choosing,” *Barbour v. Int’l Union*, 640 F.3d 599, 623 (4<sup>th</sup> Cir. 2011) (en banc) (Agee, J., concurring in the judgment); *see also United State v. Deluxe Cleaners & Laundry, Inc.*, 511 F.2d 926, 929 (4<sup>th</sup> Cir. 1975) (“[W]e do not think it permissible to construe a statute on the basis of a mere surmise as to what the

Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated.” (quoting *Vroon v. Templin*, 278 F.2d 345, 348-49 (4<sup>th</sup> Cir. 1960)) (internal quotation marks omitted)). Accordingly, we decline to import a requirement that an officer commit the tort in the course of an investigative or law enforcement activity and hold instead that the law enforcement proviso waives immunity whenever the two conditions specified by the plain language are satisfied.

*Ignacio*, 674 F.3d at 255.

In a concurring opinion Judge Diaz fully agreed that established principles of statutory construction that prevents limiting the waiver of immunity contained in the law enforcement proviso: absent an ambiguity in the words of a statute, “our analysis begins and ends with the statute’s plain language.” *In re Sunterra Corp.*, 361 F.3d 257, 265 (4<sup>th</sup> Cir. 2004).” *Ignacio*, 674 F.3d at 257 (Diaz, J., concurring). Judge Diaz added that “[w]here as here, the text of the statute is unambiguous, we should not engage in an analysis of legislative history to fabricate ambiguity.” *Id.* at 258.

The cases rejecting *Pooler* adhere to and are consistent with accepted canons of statutory construction that place the language use by the legislature as the “pole star” in determining the meaning and effect of a statute. These canons include the following: